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SUPREME COURT, U.S.

(4)

No. 05-11304

IN THE

Supreme Court of the United States

LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

JOINT APPENDIX VOLUME I

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TEXAS COURT OF CRIMINAL APPEALS

Case No. AP-74,228

Ex parte LaRoyce Lathair Smith

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/21/01	Case set for submission, *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
1/17/02	Applicant's Brief (on submission), *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
2/7/02	State's Brief (on submission), *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
3/19/02	Applicant's Reply Brief (on submission), *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
4/21/04	OPINION on State Habeas, *Ex Parte LaRoyce Lathair Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004).
11/15/04	OPINION on Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals, United States Supreme Court, *Smith v. Texas*, 543 U.S. 37 (2004).

DATE	PROCEEDINGS
3/15/05	State's Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/15/05	Applicant's Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/28/05	Applicant's Reply Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/29/05	State's Reply Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/1/06	OPINION on remand, Texas Court of Criminal Appeals, *Ex Parte LaRoyce Lathair Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006).

COURT OF CRIMINAL APPEALS

Case Number: AP-74,228

SMITH, EX PARTE LAROYCE LATHAIR,

v.

STATE OF TEXAS,

DOCKET ENTRIES

Date	Event	Description	Disposition Type	Oral
1/11/2005	REINSTATED-HC			No
1/12/2005	ORDER FILED		COURT	No
3/15/2005	BRIEF FILED		APPLNT	No
3/15/2005	BRIEF FILED		STA	No
3/23/2005	SET FOR SUBMIS			No
3/23/2005	SUBMIS NOTICE			No
3/26/2005	REPLY BRIEF FILE		APPLNT	No
3/29/2005	REPLY BRIEF FILE		STA	
4/6/2005	SUBMITTED			No

Date	Event Description	Disposition Type		Oral
10/26/2005	TRANSFER			No
3/1/2006	OPINION ISSD		RELIEF DENIED	No
3/27/2006	MANDATE ISSD			No
6/12/2006	WRIT OF CERT US		FILED	No
10/11/2006	WRIT OF CERT US		GRANTED	No
11/20/2001	WRIT FILED	HC		No
11/20/2001	WRIT FILED	HC		No
11/21/2001	SET FOR SUB-MIS			No
12/3/2001	MOTION FILED	APPLNT		No
12/4/2001	MOTION DISP	APPLNT	GRANTED	No
12/5/2001	MOTION FILED	STA		No
12/5/2001	MOTION DISP	STA	GRANTED	No
1/17/2002	EXT BRIEF FILED	APPLNT		No

Date	Event	Description	Disposition Type	Oral
1/17/2002	EXT BRIEF DISP	APPLNT	GRANTED	No
1/17/2002	BRIEF FILED	APPLNT		No
2/7/2002	BRIEF FILED	STA		No
2/25/2002	CONV SUB-MISSIO			No
2/25/2002	SET FOR SUBMIS			No
3/7/2002	ARGT RE-QUEST	STA		Yes
3/11/2002	ARGT REQUEST	APP		Yes
3/19/2002	REPLY BRIEF	FILE APPLNT		Yes
3/27/2002	CONV SUB-MITTED			No
3/27/2002	SUBMITTED			Yes
6/5/2003	TRANSFER			No
4/21/2004	OPINION ISSD		RELIEF DENIED	No
5/17/2004	MANDATE ISSD			No

Date	Event	Description	Disposition Type	Oral
11/24/2004	WRIT OF CERT US		GRANTED	No

Pretrial Motions:
Motion to Declare Tex. Code Crim. Proc. Art. 37.071
Unconstitutional As Applied. (Tr. Vol. I, pp 73-77)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
265th JUDICIAL DISTRICT

[Filed APR 11, 1991]

No. F91-22803

THE STATE OF TEXAS,

vs.

LAROYCE SMITH.

MOTION TO DECLARE TEX. CODE CRIM. PROC. ANN. ART. 37.071 UNCONSTITUTIONAL AS APPLIED

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant by and through his attorneys of record and respectfully moves that this Honorable Court declare TEX. CODE CRIM. PROC. ANN. art. 37.071 unconstitutional as applied for the following good and sufficient reasons:

I.

The Texas statutory scheme for the infliction of the death penalty is encompassed by the provisions of TEX. CODE CRIM. PROC. ANN. art. 37.071. It is provided therein that if the jury should determine that the individual committed the offense of murder while acting deliberately, was *a* person who would likely pose a danger in the future, and/or acted unreasonable in response to any provocation by the victim, that a sentence of death must be ordered. This system has

been upheld as constitutional by the United States Supreme Court in *Jurek vs. Texas*, 428 U.S. 262 (1976). However, in *Penry vs. Texas*, __ U.S. __ (June 26, 1989) the United States Supreme Court held that this statutory scheme may become unconstitutional as applied if the Defendant offers mitigating evidence about his background or character or the circumstances of the crime that are not relevant to the special verdict questions or have relevance to the Defendant's moral culpability beyond the scope of the special verdicts.

II.

It is mandatory that a trial court take judicial notice if requested by a party and supplied with the necessary information. TEX. RULE CRIM. EV. 201(d). Judicial notice may be taken at any stage of the proceeding. TEX. RULE CRIM. EV. 201(f). The trial court may judicially note a fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX. RULE CRIM. EV. 201(b). In the pending cause the Defendant will show the Court indisputable evidence that the Defendant was at the time of the commission of the offense 19 years of age. The Defendant herein respectfully requests that this Honorable Court judicially note such fact for purposes of ruling on this motion.

III.

In *Graham vs. Collins*, __ Fed. 2d __ (CAS 8- 2168, March 7, 1990) the Court of Appeals held that the trial court's failure to instruct the jury that it could consider the Defendant's age outside the context of the special issues in determining penalty required that the death sentence imposed be set aside. The Court interpreted *Penry* to mean that where a Defendant supplies evidence regarding his character, background, or the circumstances of the crime relevant to personal culpability beyond the scope of the statutory questions the jury must receive instructions that enable it to give full mitigating effect

to that evidence. The Court held that, as a matter of law, evidence of the Defendant's youth was just such a matter. The court further held that age certainly bears on the issue of moral culpability, yet neither of the special questions posed in that case adequately took such into account. The undisputed evidence in the pending cause will establish that the Defendant was 19 years of age at the time of the alleged commission of the offense. Thus, the Defendant can and will present to the jury at the punishment phase of this trial evidence of his youth in mitigation of infliction of the death penalty as that relates to his personal moral culpability.

IV.

The exclusive methodology for submission to the jury of special issues with regard to infliction of the death penalty are contained in TEX. CODE CRIM. PROC. ANN. art. 37.071. This Honorable Court, as a trial court, can do no more than follow the law as it currently exists in the State of Texas. Therefore, the trial court is precluded in providing any instruction with regard to mitigating evidence which would permit the jury to make a moral reasoned response to the age of the Defendant with regard to the determination of whether to inflict the death penalty. The trial courts of this state may enforce and interpret existing laws, but may not create new laws. For the trial court to create a scheme that would permit the jury to respond to the Defendant's mitigating evidence would contradict the current status of the law. Since the trial court may not adequately provide in the instructions to the jury at the punishment stage a mitigation charge which would permit the jury to respond to the evidence of the Defendant's youth in the determination of whether to inflict the death penalty, the court would be constrained to submit only those issues contained in TEX. CODE CRIM. PROC. ANN. art. 37.071. Thus, as applied to the Defendant in the pending cause, the Texas statutory scheme with regard to the infliction of the death penalty does not permit the proper presentation

to the jury of a mitigation instruction on *a* matter which has been determined to be mitigating as a matter of law. Therefore as applied to the Defendant in the pending cause, the Texas statutory scheme with regard to the death penalty is unconstitutional as applied. The trial court should therefore declare such statute to be unconstitutional *as* applied to the Defendant and prohibit the State from seeking the death penalty in this cause.

WHEREFORE for the foregoing reasons the Defendant respectfully prays this Honorable Court declare TEX. CODE CRIM. PROC. ANN. art. 37.071 unconstitutional as applied to the Defendant.

Respectfully submitted,

/s/ Randy Manasco
RANDY MANASCO
235 W. Yarmouth
Dallas, Texas 75208
(214) 943-6400
Bar No. 12891050

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand-delivered to the Office of the District Attorney of Dallas County, Texas on this the 11th day of April, 1991.

/s/ Randy Manasco
RANDY MANASCO

Motion to Declare Tex. Code Crim. Proc. Art. 37.071 Unconstitutional (Tr. Vol. I, pp 78-84)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
265th JUDICIAL DISTRICT

[Filed APR 11, 1991]

No. F91-22803

THE STATE OF TEXAS,

vs.

LAROYCE SMITH.

MOTION TO DECLARE TEX. CODE CRIM. PROC. ANN. ART. 37.071 UNCONSTITUTIONAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant by and through his attorneys of record and respectfully moves this Honorable Court to declare TEX. CODE CRIM. PROC. ANN. art. 37.071 unconstitutional and in support of same would show the Court as follows:

I.

Certain forms of murder are denominated capital offenses in the various provisions of TEX. PENAL CODE ANN. sec. 19.03. However, the determination of whether or not to impose-the death penalty is governed by the provisions of TEX. CODE CRIM. PROC. ANN. art. 37.071. It is this portion of the statutory authority wherein the State of Texas provides the mechanism for the infliction of the death penalty. It is the Defendant's position that as interpreted this

statute is unconstitutional. In support of said motion the Defendant would show the Court as follows:

II.

The current Texas statutory scheme is unconstitutional and in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States prohibiting the infliction of cruel and unusual punishment. As construed, the statutory scheme permits the overbroad and unbridled discretion on the part of the representatives of the State in determining whether to seek and subquently obtain the death penalty. There *is* nothing in the Texas statutory scheme which properly narrows the scope of those crimes and those actions which should be subject to the infliction of the death penalty. The overly broad and discretionary statutory scheme as adopted violates the Eighth and Fourteenth Amendment prohibitions against the infliction of a cruel and unusual punishment.

III.

The current validity of the Texas death penalty statute was upheld against an Eighth and Fourteenth Amendment challenge in *Jurek vs. Texas*, 428 U.S. 262 (1976). However, the basis for the ruling by the United States Supreme Court was the assurance in *Jurek* that the special issues would be interpreted broadly enough to permit the sentencing authority to consider all the relevant mitigating evidence the Defendant might present to prevent the imposition of the death sentence. However, since that decision of the United States Supreme Court the Court of Criminal Appeals has had numerous opportunities to interpret the statutory scheme and has failed to provide any definitions of relevant words, terms and phrases which would broaden the effect of the special issues so as to permit the introduction' and subsequent use by the jury of mitigating evidence. For example, the Court of Criminal Appeals has refused to define the following words, terms and phrases: "deliberately", "reasonable expectation

that death will result", "probability", "criminal acts of violence", "society" and "continuing threat to society". Thus, the premise upon which *Jurek* was decided, that the Court of Criminal Appeals would expand by interpretation the definition of these relevant terms, words and phrases, has not been fulfilled. Therefore as currently construed, the Texas death penalty scheme is unconstitutional and in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. The United States Supreme Court recognized in *Penry vs. Texas*, __ U.S. __ (June 26, 1989) that certain types of mitigating evidence were beyond the parameters of the statutory scheme as construed in Texas and therefore the statute was unconstitutional as applied.

IV.

The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues. There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type.

V.

The current statutory scheme provides that the jury may not answer any of the special issues submitted yes unless it believes the State has proven such special issues "beyond a reasonable doubt". However, there is no statutory definition nor has the Court of Criminal Appeals ever provided a definition for this legal phrase. Therefore the jury is left without guidance as to the standard of proof which should be utilized

in resolving the issues before them. Such a circumstance deprives the Defendant in a capital murder case of the right to a fair trial and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VI.

It is provided in the Texas statutory scheme with regard to capital murder that if the jury returns a negative answer to any special issues submitted to them that the sentence which shall be imposed is confinement in the Texas Department of Criminal Justice—Institutional Division for life. While "death" has an obvious meaning, the phrase "life in the Texas Department of Criminal Justice—Institutional Division" and the circumstances of such sentence are extremely vague and subject to common misunderstanding and speculation by jurors. The effect of the. jurors common knowledge of the existence of the parole law on a life sentence uninstructed or limited by TEX. CODE CRIM. PROC. ANN. art. 37.071 sec. 4(d) results in a sentencing procedure of unbridled discretion influenced by speculation and wholly arbitrary and capricious imposition of the death penalty.

VII.

The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional in that it fails to provide the jury with the option of assessing a sentence of life without parole. Without this option, jurors cannot be assured that a defendant who they believe to be a continuinig threat to society will be removed from society for the remainder of his natural life. Therefore no real option exists for the jury but to condemn the defendant to death. This violates the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States in failing to provide a meaningful alternative for the jury other than a penalty which results in the infliction of death.

VIII.

The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional because it fails to provide a methodology by which the jury may consider and give effect to in a constitutionally meaningful way any and all mitigating evidence as such evidence is relevant and material in answering special issues or determining the appropriateness of imposing the death sentence. There is currently under Texas law no definition provided of "mitigation evidence" or mandated instructions as to what constitutes "mitigating evidence". Further, there is no instruction mandated by TEX. CODE CRIM. PROC. ANN. art. 37.071 or any other article in the Code of Criminal Procedure or the Texas Penal Code informing the jury on how to apply evidence of mitigation in answering the special issues. Thus, the referred to article is objectionable to the Defendant because it does not provide for jury instructions on the burden of proving mitigating evidence to the jury, what a jury must do with mitigating evidence if it is proven or not disproven to their satisfaction during deliberations, or what standards are to be utilized in considering such evidence and what, if any, effect may be given to such evidence outside and apart from the special issues currently-contained in TEX. CODE CRIM. PROC. ANN. art. 37.071. The current special issues presented in the Texas sentencing scheme fail to fully address issues concerning the character and background of the accused and the circumstances of the crime which denies and deprives the Defendant of the right to use evidence from experts or laymen regarding the applicability of the special issues to the Defendant and his circumstances.

WHEREFORE for the foregoing reasons the Defendant respectfully prays this Honorable Court declare TEX. CRIM. CODE PROC. ANN. art. 37.071 unconstitutional.

Respectfully submitted,

/s/ Randy Manasco
RANDY MANASCO
235 W. Yarmouth
Dallas, Texas 75208
(214) 943-6400
Bar No. 12891050

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand-delivered to the Office of the District Attorney of Dallas County, Texas on this the 11th day of April, 1991.

/s/ Randy Manasco
RANDY MANASCO

Motion to Reveal Mitigation Charge (Tr. Vol. I, pp 87-90)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
265th JUDICIAL DISTRICT

[Filed APR 11, 1991]

No. F91-22803

THE STATE OF TEXAS,

vs.

LAROYCE SMITH.

MOTION TO REVEAL MITIGATION CHARGE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant by and through his attorneys of record and respectfully moves that this Honorable Court provide the Defendant with a proposed mitigation charge in line with the decision of the United States Supreme Court in *Penry vs. Lynaugh*, __ U.S. __ (87-6177, June 26, 1989). In support of said motion the Defendant would show the Court as follows:

I.

The Defendant in good faith herein advises the Court that he believes that during the punishment stage of this trial for the offense of capital murder he will be able to offer evidence in mitigation which has relevance beyond the parameters of the special issues contained in TEX. CODE CRIM. PROC.. ANN. art. 37.071. In *Penry vs. Lynaugh*, Supra, the United States Supreme Court held that although the Texas death penalty scheme is not unconstitutional per se, it may,

depending upon the circumstances become unconstitutional as applied. In that case the Court held that evidence of a mitigating nature was presented which had relevance beyond the parameters of the special issues contained in TEX. CODE CRIM. PROC. ANN. art. 37.071 and that therefore that the Texas capital murder scheme was applied to Penry in violation of the Eighth and Fourteenth Amendments because the Court's charge to the jury did not permit a "discretionary grant of mercy based upon the existence of mitigating circumstances."

II.

Since the decision of the United States Supreme Court in *Penry* the Texas Legislature has met in several sessions but has failed to address the problems and issues created by the decision of the Supreme Court in that case. The Court of Criminal Appeals has had numerous opportunities to address the problem raised in *Penry* and has failed to do so in any written opinion. Therefore the Defendant and his counsel are unable to look to any statutes or decisions of the Court of Criminal Appeals which explain how the issue of mitigation of punishment will be submitted to the jury at the penalty phase. At this point in time, prior to the commencement of voir dire, defense counsel can only speculate as to the manner in which the Court will attempt to address the "*Penry*" problem at the time of the delivery of the instructions to the jury at the punishment stage. Counsel is therefore prevented from being able to adequately voir dire the prospective jurors since he cannot accurately determine how the Court will attempt to resolve the problem.

III.

The Defendant will be deprived of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States as well as the due process of law as guaranteed by the Fourteenth

Amendment to the Constitution of the United States if he is not provided in advance of the commencement of voir dire with the proposed mitigation instructions from the trial court to be utilized for purposes of voir dire in determining whether to exercise a challenge for cause or to exercise a peremptory challenge.

WHEREFORE for the foregoing reasons the Defendant respectfully prays this Honorable Court present him prior to the commencement of voir dire with a proposed mitigation charge.

Respectfully submitted,

/s/ Randy Manasco
RANDY MANASCO
235 W. Yarmouth
Dallas, Texas 75208
(214) 943-6400
Bar No. 12891050

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand-delivered to the Office of the District Attorney of Dallas County, Texas on this the 11th day of April, 1991.

/s/ Randy Manasco
Randy Manasco

Colloquy Between Trial Court and Defense Counsel
Record Excerpt: S.F. VI: 2-4

PROCEEDINGS

Monday
April 22, 1991

THE COURT: Cause number F91-22803-R, the State of Texas versus LaRoyce Smith.

There are some matters the Defense wished to place on the record prior to jury. selection. Defendant's trial motion number one filed April the 11th, each part is granted. Do you all have copies of those? That's asking for the court reporter to record everything.

MR. MANASCO: I've given them to Mr. Nancarrow, but he may have given them to Mr. Lucas.

THE COURT: A motion to quash has been filed. I've read through it. Is there anything that isn't in the written portion of the motion to quash that you wish to supplement orally?

MR. MANASCO: Judge, the only thing I would like to do is to incorporate—there is an additional motion to quash that I filed with my first batch of motions, I think it's on long legal paper, indicating, basically, that the charges are vague and uses unintelligible language and whatever the specific tracking language is in the Texas Code of Criminal Procedure to quash, and we've asked that that be incorporated with this motion to quash.

THE COURT: I've already ruled on that motion to quash, as I recall, and it was denied at that time.

MR. MANASCO: I believe so. As a matter of fact, Judge, I believe all the Court's motions have been ruled on at this point; is that correct, sir?

THE COURT: Yes.

MR. MANASCO: I don't have—I haven't looked at the Court's jacket. Thank you.

THE COURT: This motion to quash must be denied also.

The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and sort of read them and put them in my mind together. Is there anything not included in those two motions that you wish to supplement orally?

MR. MANASCO: No, Your Honor.

THE COURT: Those will have to be denied.

Motion to reveal mitigation charge, I've given you a copy of what we intend to use, and you have a copy; is that correct?

MR. MANASCO: Yes, sir.

THE COURT: If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

MR. MANASCO: Thank you.

THE COURT: Motion for discovery of information regarding prior jury service, that being the district attorney's office records on prior jury service of individuals, I'm going to have to deny that as being work product of the district attorney's office.

Motion to restrict the use of peremptory challenges, the State's strikes must be exercised in a racially neutral manner.

For the record, I'd like to say that- I've known—I guess I've known all of the attorneys for at least eight years, and I've known Mr. Nancarrow and Mr. Manasco on a personal,

professional, and social basis, and I know the others professionally and personally, not socially. It's my feeling based on my knowledge of these people and their reputations that all the motions will be complied with, including the Batson motion. I don't anticipate that any of the motions will not be complied with.

MR. MANASCO: Your Honor, in that vein, the motions, at least, hopefully, the way they are drafted and at least the intent is that to be a continuing motion. For example, when I was talking with Mr. Lucas several weeks ago he indicated the only bad acts or—well, prior bad acts that

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[115] THE COURT: I'll go ahead and excuse Ms. Holloway, and I'll tell Mr. McMillen he can go. We'll see you all at 1:20.

(Lunch recess taken.)

(The Veniremen, Mr. Powell, was returned to the courtroom, and the following proceedings were had:)

THE COURT: Mr. Powell, the attorneys at this point are going to have some question as for you. State.

GARY POWELL, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MS. MCDANIEL:

Q Good afternoon, Mr. Powell. My name is Lana McDaniel, and I'm the assistant district attorney. Mark Nancarrow, to my right, is also an assistant district attorney. We will be assisting Mr. Hugh Lucas in the trial of this case for the State of Texas.

At the counsel table to my right is Mr. Winfield Scott and Randy Manasco, representing the defendant, LaRoyce

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[149] have 12 subtlety different definitions of deliberately. And if we don't get a definition from the court that can be — you know, that's a discretionary point.

And the second factor, future criminal acts of violence, I don't know that from what I've heard that we have got a precise definition of that. So I think I could apply it. I don't know that I'd necessarily feel that it restricts my discretion

too much. If anything, it would be, you know, it would be nice to have a little more.

Q You've implied then that you have no quarrel with the hurdles or the screening process and, in fact, wish that there were even more of it. Is that—

A Well, I guess that's—in a nutshell, that's right. It would be nice to—I mean not that I say list any more factors, that there needs to be another five or six factors to jump through, but it's serious business when you're deciding somebody's life or death, and you don't want to have disagreements over something like the meaning of a word. I guess, practicing civil law, we try and nail down all the definitions that could potentially be hangups.

Q What the law has done even further is come up with something that kind of throws this about halfway in a tailspin because there was a decision called Penry that, in effect, tells jurors that they can consider all kinds of mitigating evidence and that if any of that mitigating evidence causes [150] them to feel that the death penalty is not appropriate, then they can, in effect, answer one of the questions no in spite of the evidence to save him from the death penalty.

Now, don't ask me what—you know, how we're going to deal with that except to tell you that we anticipate the Court will give you an instruction more or less on the lines that I've just paraphrased for you. Some people tell us, "Well, to heck with it. Don't bother me with any mitigating evidence. I'll answer these three questions, but I really don't intend to listen to any—you know, if it doesn't fit into one of those categories, then I don't see any reason to listen to it." Others tell us, "I will certainly listen to mitigating evidence, his background."

I think you mentioned earlier something about the more you know about someone, the easier it is to answer these questions. I think you were being asked about if you had just the case itself and nothing more, could you answer the

question, and you said, "Yes, but I would prefer to have other—you know, as much as I could about the individual."

So this decision, in effect, has said we want the jury to have every shred of evidence available from either side—of course, realizing the defendant has no responsibility to bring any evidence unless they want to. Keeping that in mind, would you listen to mitigating evidence if it were presented, or would that be of no interest to you?

[151] A No, I would listen.

Q Could you follow the Court's instructions that, in effect, if you felt the death penalty was not appropriate, even though they might have succeeded in answering the questions yes, could you nevertheless answer one of them no to satisfy, in effect—if you were persuaded that he should not be sentenced to death, could you answer one of the questions no in order to give effect to your belief that the death penalty should not be imposed?

A I'm not sure I understood your question.

Q I'm not sure I understand it, either. The law, in effect, will say that if you are persuaded by the mitigating evidence, that the defendant should not be sentenced to death, then the Court may well tell you that you shall answer at least one of these special issues no in order to give effect to your belief that the death penalty should not be imposed.

Now, some people tell us, can't do it. Other people tell us they could do it, that they could, in effect, misanswer one of the questions in order to arrive at the desired result.

A Well, that's a real tough choice. So the law, as you understand the way the verdict or the form would be submitted, there wouldn't be a fourth choice, any other mitigating circumstances? You have to take these three, work with these three, and regardless of how you might feel about [152] these three, if you feel the other mitigating evidence indicated at that time was inappropriate, pick one of these

three, any one, and answer no, just so you get the result that you think is correct?

Q As bizarre as that sounds, that's exactly right.

A Well, if that's the instruction from the Court, I could follow the instruction from with the Court. Frankly, my legal sensibilities would be more comfortable if they just put a fourth element in there and just ask if there are any other mitigating circumstances that you find make it inappropriate, but if that's what the law requires—

Q So you can abide by the Court's instructions even though it may seem bizarre and sort of offend your feelings as an attorney?

A Yes.

MR. SCOTT: Excuse me just one moment.

THE COURT: While they are discussing that, I can tell looking at you there's still sort of a question on your mind about this deal, so I'll tell him about the Penry case so he can get a perspective.

The Penry case involved a situation where a man was charged with capital murder and he was mentally retarded. There is nothing in there that says anything about mental retardation. The jury got to the end and it was yes, yes, yes. The Supreme Court, without commenting on whether [153] that was a reason to say no, said at least the jury ought to be able to say, yes, all those should be yes, but heck, the guy is mentally retarded and he's got a limited responsibility. Legally, he is responsible for this, but he really shouldn't die for it. A jury ought to at least be allowed to exercise that moral decision. You can see in there, there's nowhere to fit that in.

So the Supreme Court has said that to give effect to your moral decision that the death penalty wouldn't be right in this particular case, we've got to have some way to let you do that. And the way it is—it may seem a little illogical the way

they told us to do it, but that's the way they have told us to do it so we're doing it.

Does that make a little bit more sense why it's done that way?

VENIREMAN: Yeah, historically, now I understand why it's done that way. It just does seem illogical where you take an oath to answer all the questions correctly, and then you subvert that by—and the court says, "Well, in this one instance, we'll let you answer otherwise than what you feel is absolutely the truth in order to give effect to this other."

Well, maybe in the next session they will add a fourth element and just let you—to catch those mitigating circumstances.

[154] THE COURT: We're all hoping.

MR. SCOTT: Excuse me one moment.

THE COURT: Yes.

Q (By Mr. Scott.) I think you've already been explained the business about the—well, what I call legal mishmash about the fine distinction between the word intentionally and deliberately, but the law, I think they have characterised it in terms of intentionally is kind of did he do the act, and deliberately is how did he do it. Frankly, I think that falls perhaps short of really pinpointing the exact distinction if there is one between those two concepts.

The cases have talked in terms of some thought process that has to exist before the fact, maybe not premeditation in the textbook sense of the word, but some sort of thought process, some forethought, if you will.

Now, in the olden days back when I first started prosecuting, they talked in terms of malice aforethought. That's no longer used, but that concept of some type of forethought, some type of thought process before the act has to exist.

The comments I'm just making now, does that make any sense to you at all as far as distinguishing between those two concepts?

A Yes.

Q Juries deliberate. They go back there and go

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[25] excused from the courtroom, and the following proceedings were had:)

MS. MCDANIEL: Submit the juror.

THE COURT: State's challenge for cause is granted.

(A brief recess was taken.)

(The Venireman, Dottie Wright, was returned to the courtroom, and the following proceedings were had:)

THE COURT: As I mentioned to you back there, there's no right or wrong answers. We're just looking for the way you truly and honestly feel about these matters.

With that being said, State.

DOTTIE WRIGHT, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MR. NANCARROW:

Q Good morning, Ms. Wright, how are you?
A I'm fine.
Q My name is Mark Nancarrow. This is Lana McDaniel sitting here with me. We, along with Hugh Lucas, will

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[31] Q Okay. Do you feel that if the circumstances of the case were—convinced you—could convince you, though—
A Right.
Q —just of that case, he has been a model citizen up to the time he committed the offense—
A Right.

Q —the facts of the case alone could be sufficient in your mind to assess the death sentence regardless of the fact that they had been a good citizen up to that point?

A Right.

Q Is that right?

A Right.

Q Okay. Let me tell you a little bit about how the trial works. You are not actually asked to give somebody life or death; what will happen is you'll be asked to answer a couple of questions. The way you answer those questions dictates whether or not he lives or dies. You'd be asked a couple of questions. If you answered them all yes, then he gets the death sentence. If you answer any question no, the judge has to assess a life sentence. You would know when you're back there when you fill out and answer the questions what's going to happen, it's no big secret, the judge cannot change whatever you do. You all put down yes answers, he dies at some point in the future. You put down one "no", he's [32] given a life sentence. That's how the trial would work at that point in the trial. You won't go back and decide, well,—you know, ask yourself, "Should he live or die?" What you'd be doing is asking yourself to answer these questions.

A Okay.

Q How you answer them results in a life or death sentence, okay?

A Okay.

Q Let me tell you what a capital murder is. I don't know if you're familiar with what a capital murder means, but it's different from a regular murder.

A murder would be an intentional taking of someone else's life, you specifically want someone to die. That's what an intentional killing is. You do whatever it takes to cause that person to die and that's what you want to happen. That's an intentional taking of a life.

Capital murder—and for that, for just a murder, an intentional killing, the range of punishment is anywhere from five years to life in the penitentiary, and the possibility of probation. Capital murder is a murder—in this case we've alleged that it happened during the commission of a robbery, and during the commission or attempted commission of a robbery. Okay? That's what elevates a regular—or regular murder case to the level of capital where you can get the death sentence. is if you commit it

* * *

[62] experience where they say, "Well, I don't like it, but I know that sometimes when people are on drugs they do things they wouldn't do otherwise." Other people say—and, therefore, think that may be a mitigating circumstance, but for the fact that he did this, you know, he probably wouldn't have taken drugs, he probably wouldn't have done it. Other jurors look at it the other way, they say, "Well, that's not mitigating, that's aggravating, because not only did he murder someone, but he's a drug junkie, too. He's a drug addict."

So how you feel mitigating evidence plays a part, that's up to you and the other jurors. Again, the person sitting right next to you may be shaking his head while you're talking about something or he may be talking about some mitigating evidence, and you may think, "Oh, that's a bunch of bull," okay? It's what you think that it means.

Now, the—how that comes into play is that it kind of throws all this off into a kilter. The Court will instruct you that if you hear mitigating evidence and that because of hearing certain mitigating evidence you think that LaRoyce Smith should live instead of die and get a life sentence instead of a death sentence, then you shall—which is legal language for must—shall change one of those—those answers from a "yes" to a "no" in order to give effect to your verdict.

In other words, if all you have are two questions [63] and if you believe "yes" is the answer to both questions, then he will die, but if you also believe as a juror that because of the mitigating evidence, because of the facts of the case, because of all of the evidence that you heard in the trial, he should not die, then the law says that you will change your answer, one of those answers to "no". Does that make any sense?

A Yes.

Q Okay. My question to you is that if you heard that type of evidence—again, whatever it may mean to you—are you the type of person that's able to go back and change one of your answers to no in order to give true effect and meaning to your heartfelt need?

A No. If it's proven to me, my answer is going to stay strong as what I feel is right, you know.

Q Okay. So, I take it, that even though you've answered yes to question one and two that if you feel in your heart of hearts, mind of minds that he should not die, then you would be able to follow the Court's instructions and change one of the answers to "no" so that he would receive a life sentence as opposed to a death sentence?

A All I'm just saying is if the evidence is there and I feel that it's a death penalty, yes, it would stay yes.

Q Okay. Fair enough. If you thought that after hearing all the mitigating evidence that the death penalty [64] should still be imposed, you'd keep the answer yes?

A Right.

Q All right. Conversely, if you heard the evidence that convinced you that there was mitigating evidence that he shouldn't die, you could change one of the answers to "no"; is that correct?

A If it was proven that he was innocent or something like that, yes, I could.

Q Well, at that point you as a juror—

A You know as a—all right.

Q Okay. At that point the jurors have already decided that the person has been found guilty, okay?

A Uh-huh.

Q Now, what the question is is whether or not there's anything in his life or background that would tend to mitigate the offense. Like I said, some examples the courts told us if people have a low intelligence level or if they have been abused as a child or things of that nature, those are things at least a jury should be able to consider and decide if that—if the person should live or die, you're able to take those into consideration, okay?

So my question in that regard, if you heard evidence that—mitigating—evidence that you felt was mitigating, then you could give effect to that feeling by putting a "no" answer in one of those slots; is that correct?

[65] A I'm thinking on that. Let's see, I think I would still say yes. It just depends -- yes, I think it would still be yes.

Q I'm sorry.

A Yes.

Q You could change the answer?

A Well, not as I say, change the answer—well, excuse me. Let me say no. In a way, what I'm saying is, no. I'm saying no, you know. It's just like I say, if I've really been proven what it is, I feel it need to be a death sentence, I believe it still would be—my answer still would be yes, you know, as far as the death penalty. No as a life sentence.

Q Okay. That's what the law is saying. They're saying if the answer to both questions are yes, then he's going to get the death sentence.

A Uh-huh.

Q But the law also says that a jury may hear evidence that may make them feel that he shouldn't die. If you heard such evidence and the other jurors felt, you know—if you all came to the conclusion that, "Well, yes, he did act intentionally and deliberately and he is a threat to society, but

because of other things about his life, we don't think he should die," then the law says you'll change your answer to "no".

A Like I say, you got to really prove it to me, but [66] it still would be—yeah, it's possible, yes, I could probably change it, but, you know it's—

Q Okay. Well, I'm probably not explaining it very well, because what I'm trying to say is that it's not just if you hear any evidence. If you hear something about he made an "F" in fifth grade, something like that, that's not probably going to get us there, but the law says if you hear evidence that makes you feel he shouldn't die, then you're able to change your answer to say, "No, he shouldn't." The only way to this is to say no to one of those questions.

Ideally, there should be a fourth question, probably, that says, "If there's mitigating evidence, do you think that it is sufficient to, in essence, spare or save his life," but the law—maybe they'll change that in the legislative session, maybe not, but that's something—the law is a little ahead of how the statutory language is on the special issues.

So I guess all I'm asking you is if you hear evidence that makes you feel that he shouldn't die, the law says that you will give effect to that by changing or by putting in "no" to one of those answers, okay? That's the only way the court can save him is that if there's a "no" answer.

A Uh-huh.

Q I'm just asking you is that if you hear that [67] evidence, can you do it?

A Yes, I can do it.

Q Okay. You don't have any question about that, do you?

A No.

Q All right. Let me just ask you—

MR. MANASCO: Judge, how much time do I have?

Q (By Mr. Manasco) Let me just ask you, what type of evidence do you feel might—might be a mitigating evidence to save him from dying?

A As far as that, just tell me exactly about the person's—what, they're, you know, was trying to do and just give me a little more evidence in what's going on with the case because I think, you know—

Q So you're open to a wide spectrum of things that might be shown to you about him or his background; is that correct?

A Not too far of his background, you know, because I don't want to go back, like I say, if he made an effort and all that there, you know, what's happening now in his life now that—get the background of what's happening now to him or her.

Q There are certain—are there certain factors that are in existence now that would make you think that it

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[3] I guess if the Court would give us lead to in some way—

THE COURT: What we'll do is prior to swearing in those six jurors, we'll ask if they know those people, and if they do and they have a problem, then we'll cross that bridge.

MR. MANASCO: All right. Fair enough. Thank you.

THE COURT: I bet you they won't know them.

(The Venireman, Ms. Lane, was returned to the courtroom, and the following proceedings were had:)

THE COURT: This is Teresa Lane. Ms. Lane, as I mentioned earlier, there aren't any right or wrong answers. We just need to know how you feel about these things.

State.

TERESA LANE, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MR. NANCARROW:

Q Good morning, Ms. Lane. My name is Mark Nancarrow.

* * *

[15] that that crime was violent enough, do you think that you could answer that question yes?

A If there are enough facts about the crime, yes.

Q The reason I say that is because there is no requirement that a person have a prior criminal record. A lot of people say, "You know, what I would want to know in order to predict how he might act in the future, I think, you know,

what would help me the most is to know what crime he's done in the past."

A person is eligible for the death sentence the first crime he commits if it's violent enough, if it's a violent capital murder, killing during a robbery. The law says a jury can assess the death penalty if they are convinced from all the facts and circumstances these questions should be answered yes, including that second one. The jury hears the evidence, says, "Well, you know, I saw what he did here. You just don't wake up that way. And I feel that based on what you told me and what I've seen and what he did, I think he's going to be dangerous in the future." The law says jurors can do that if they're convinced that that question should be answered yes. Okay?

A Uh-huh.

Q And again, we're looking for a juror that's not leaning one way or the other, that they're going to look at these questions and answer them regardless of what that means. [16] If the facts indicate any of these questions should be answered yes and that means he dies, well, that's just what the facts call for and that's the way you vote. On the other hand, if you're convinced these questions should be answered no, or one of them should be no, and that means he gets life, then the jury can do that, too.

Would you be able to do that?

A Yes.

Q Even though you decided he killed somebody during a robbery, if we don't convince you all these should be yes and one of them no, you would have no problem answering knowing he would get a life sentence?

A No.

Q You feel that in some cases a life sentence might be the appropriate punishment even though it's a capital murder?

A Yes.

Q Now, these questions, in essence, are assumed to be no. There is like an invisible no on these questions when you go back there. And we, the State, have got to convince you otherwise. You have to look to us to prove it to you just like you have to look to us to prove to you that he did anything, that he's guilty in the first half.

We are required to bring you the evidence to convince you how these questions should be answered.

[31] A Uh-huh.

Q Ms. Lane, Mr. Nancarrow has talked to you, also, and told you that this scheme of special issues is kind of skewed because a jury can still believe that an act was done deliberately and that he could be a future threat to society but still believe that he should die. It could be his role in the murder. It could be just a fairness issue in terms of other people involved, what has happened to them.

It could be any number of things, but a juror could, in essence, just say, "I don't think he should die." Then if all you have are those two questions, and if you honestly believe the answers were yes, then the person would be killed even though the jury still felt he should live.

And the legislature hasn't quite caught up to the law. The Supreme Court has recognized that, and, ideally, there should probably be a fourth special issue saying regardless of answers one through three, do you feel there is mitigating evidence such that it should save his life or some phrase like that.

I probably wouldn't be a very good legislator since I can't draft it, but that's not the way the law is now. That's not the way the statute is, but the judge would give you in the court's charge an instruction that says if you find there is mitigating evidence, and if you believe that that should save him from the death penalty, then you shall—[32] shall is the big legal word for must—shall change one of the answers to no so that you can give effect to your heartfelt beliefs.

In other words, if there's two yes answers, the judge has to sentence him to death. If there is one no, he gets a life sentence. Those are the only two options. And so the law has said that the only way the judge could give effect to the jury's true belief is if one answer is no.

Do you feel that if you heard mitigating evidence and if you felt that regardless of whether he would be a threat in the

future and regardless of whether you felt the act was done deliberately, if you felt that he should not die, could you go back and, in essence, erase one of the yeses and put no in order to give effect and meaning to your true feelings?

A Yes.

Q I mean, that's what the Court would tell you all to do, that you're allowed to do, and if you felt he should live, then the Court says you shall change one of the answers. In other words, you're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules.

Do you have any problem with that, ma'am?

A Huh-uh.

Q Do you understand why that particular charge would

[171] it three or four weeks." If you feel different, just let us know that, too. If you don't understand the question or what they're asking, just say, "I don't understand your question," and they'll work it around to where it's clear.

THE VENIREMAN: Okay.

THE COURT: All right. State.

LYNN BARTHOLOMEW, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MR. NANCARROW:

Q Good afternoon, Ms. Bartholomew.

A Hello.

Q My name is Mark Nancarrow. This is Lana McDaniel sitting here with me, Winfield Scott, Randy Manasco, and LaRoyce Smith.

A Hello.

Q Mr. Scott and Mr. Manasco represent the defendant, LaRoyce Smith. Myself and Lana McDaniel will be assisting Hugh Lucas in representing the State of Texas.

Let me ask you, first, if you know anybody—any

* * *

[184] "no"?

Q Yes, ma'am, could you—

A Yes, I think it could be a "yes" or a "no".

Q What I'm getting at, some people say—to them it's a domino. If I've decided number one is yes, he acted deliberately, I don't care what you show me, I'm going to answer that second one yes, also, despite what I hear, that

there is no way I could ever answer that second one no if I answer that first one yes. I take it that you could depending on what evidence you hear—

A I think number two—if number one is a "yes," that number two could either be a "yes" or a "no".

Q Okay. These questions are, you know—they're not like dominoes. You don't answer one and that dictates what you do to the other one.

A Correct.

Q You take them independent. You can take them in either order. You can start with the second one first. They're just labeled one and two, but that doesn't mean you have to take them that way. You're supposed to take them independent of each other based on all the facts, let the facts determine what the answer is. By that, I mean don't answer them to get a desired result. Some people say, "Well, if I find that he killed someone intentionally, I want him to die. So, I'm going to answer these yes to get that result [185] regardless of the facts." What we have to have are jurors that will tell us despite the fact that I found him guilty of capital murder and not wanting a specific result, I will answer the questions based on the facts regardless of what the means, live or die.

Do you think you can do that?

A Yes, I do.

Q Just let the facts and the circumstances dictate the way the answers to the questions should be answered regardless of the effect it has, either be a life or death sentence.

A I think I could.

Q Let me go over a couple of rights the defendant has. First of all, he has a right to be presumed innocent. That means as he sits here today, you have got to be able to assure us that you will give him the benefit of that presumption, that you will, in essence, assume he has done nothing until we convince you otherwise, because we, the State, have the

burden of proof. We're the ones that are required to bring the evidence and do the proving and convince you beyond a reasonable doubt that he has, in fact, done something.

Can you require us to do that, hold us to that burden, make us convince you, and if we don't, find him not guilty?

[187] proof, is entirely upon the State to prove that he's guilty. They can sit there and do nothing and say, "Well, you know, you don't have a case, I didn't do it," or, you know, they may choose not to testify or maybe he's not, you know, well-educated or maybe he doesn't speak well or whatever, maybe he doesn't choose to match wits with a lawyer. Whatever reasons they choose, should that occur, you'll be instructed that you cannot consider that as evidence. The lack of testimony, the lack of the defendant testifying is nothing, okay? You'd be limited to what you have before you without consideration to this lack of evidence. Any problem with that?

A No.

Q I want to throw a little wrinkle in here that I forgot to cover on these questions. There's what's considered mitigating evidence under the law. Mitigating evidence is any sort of evidence that might, in a person's mind, tend to reduce or diminish somebody's responsibility for his actions. For instance, if a person is retarded or has suffered abuse or, you know, has been physically abused forever, or has a drug or alcohol problem, those types of factors might, in a juror's mind, tend to diminish the person's responsibility, lessen his responsibility for, in this case, say a death. Well, the law says that in the event you hear certain types of evidence, by a jury, convinces them that, yes, it is your [188] heart, you don't think the person should die for what he did, despite the fact that these questions technically are answered yes, you look at the facts, and say, yes, yes, but see this mitigating evidence, it-really doesn't fit into any one of these questions. You can't really—there's no way to plug it in in deciding those questions. The law has said if you do hear this mitigating evidence and you feel that he should not die for what he did, you have the option to go back and change one of these answers to no to give effect to that feeling that he should not die.

Do you follow me on that?

A Yes.

Do you feel that you could follow those instructions if the Court gave them to you?

A Yes.

Q The reason I say if the Court gave them to you, I don't know if you'll hear any or not in this case, but in the event that any of this type of evidence is hinted at, the judge is required to give you this instruction and by that, I mean if it's hinted at, you know, what is brought out may to one juror be considered mitigating, to the juror sitting next to them, they may say it's aggravating. If you hear evidence that the guy was doing drugs when he committed the crime or has been doing drugs all his life, one juror may be sympathetic to that and say, "Well, you know, he's been doing [189] drugs, if he hadn't, maybe he wouldn't have done this. I don't think he should die because of that." The juror next to him may say, "Well, he's been voluntarily doing drugs all his life, you know, that makes it even worse. If he hadn't been doing those, the person might still be alive. I think it's aggravating. I think it makes it worse because he's not only killing people, he was on drugs when he was doing that."

The point I'm getting at is if evidence was raised or presented, you as the jury are going to have to kind of have two questions to answer about mitigation. First, is it mitigating evidence to start with, you know—you have to decide as a group what you heard, is it mitigating? Secondly, is it mitigating to the point where the person is not as responsible as he should be and should not die for what he did, okay? If that's the case, even though you may have technically answered these questions yes in your mind, you have the right to go back and change—you just pick one. It doesn't matter—go back and pick one and say no, and that would result in a life sentence. Okay.

Any problem with that?

A No.

Q Do you feel that you could do that if that's the way you felt?

A Yes.

Q I've questioned you and gone over a lot of [204] definitely think it's a valid science.

Q So, I take it from that that you'd be at least willing to listen to the witness and if the witness made sense, you could factor it in—

A Yes.

Q —and if it didn't make sense, you could discard it? Okay. The law—kind of getting back to those two questions, it used to be that there were no questions and the jury has—like I was kind of saying or trying to say earlier, they had a wide discretion on what to do. That before these special issues came into being, juries would just decide whether it should be life or death, 15 years probation, whatever. Because of the way they're structured, two "yes" answers equals death, and there's no secret. We're not, you know, trying to hide the law or anything. It's all up front. It's come to the court's attention, primarily, because the legislature is a little bit behind the court's decisions that this format may not be entirely fair because jurors could believe that the act was done deliberately and the jurors could believe that the person—there's a probability that they would be a continuing threat to society, but still believe that the person shouldn't die. In other words, through the whole ball of wax, through the trial and the guilt-innocence and punishment phase, they could just believe that under this fact situation with this person he should [205] die, and by just answering mechanically "yes" and "yes," if that's a true answer, you could never save the person. Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence—that's really anything. It's stuff you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances

—if you felt that he shouldn't die, then you're authorized—actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from "yes" to "no" if you feel that he should not die.

Do you have any problem with that?

A No.

Q Okay. I mean, it's not like you're cheating or lying or doing something—

A No.

Q —to change it. That's what the Court would tell you to do to give effect to your heartfelt belief that he should live, okay? Also these two special issues are kind of designed to be high hurdles. In other words, the law is trying to decide of all the people that commit capital murders, murders in the course of robbery, why should some live and some die. They're trying, I think, to remove the—they called it, I think, arbitrary and freakish dispositions or impositions of the death sentence or capriciously done, [206] something like that, that there's no rhyme or reason to it. I think what the legislature is trying to do is set certain barriers or hurdles for the State to get over before a person should be killed, and they're supposed to be high hurdles. In other words, the standard is beyond a reasonable doubt. They're looking for a deliberate act. They're looking for future dangerousness. On top of all that, they're looking for no mitigation to change the answers.

Do you have any problem with the way those special issues are designed and how you could answer them if you felt he should live instead of die?

A No.

Q I think that's really all that I needed to go over with you. Let me just kind of ask you to put yourself in my place. If you're sitting here trying to defend someone, if you're questioning someone with your life experiences or your

values, is there anything that you feel that you would want to know that maybe we haven't explored so far?

A No.

MR. MANASCO: Thank you, ma'am. I appreciate your visiting with me.

VENIREMAN: Thank you.

THE COURT: State have anything further?

MR. NANCARROW: No, Your Honor.

THE COURT: Okay. If you'll step back in

Guilt Phase Trial Testimony Excerpts
Vol. XXVIII: 126-138 (Smith, Johnnie Mae)

MR. MANASCO: Your Honor, the defense would call Johnnie Mae Smith. I believe Mrs. Smith has been sworn.

JOHNNIE MAE SMITH, the witness hereinbefore named, having been previously cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please.
A Johnnie Mae Smith.
Q Mrs. Smith, how are you related to LaRoyce?
A I'm his mother.
Q Mrs. Smith, do you mind me asking how old you are?
[126] A Yes.
Q Do you have another child?
A Yes.
Q Who's that?
A Myron Tyrone Wilson.
Q And Myron Wilson was from your first marriage?
A My first marriage.
Q And how old is he?
A Be 30 in August.
Q Can you tell the jury what Leroy Smith, Mr. Smith, LaRoyce's dad, what does he do for a living?
A I think he's a cook. I'm not sure.
Q The last time that you kept up with his occupation, do you know what he was doing for a living?
A A cook.
Q Leroy Smith, LaRoyce's dad, he had been down to the penitentiary, had he not?
A Yes.
Q What did he go to the pen for?

A Robbery.

Q Is this something that you knew about all along or—

A No, he was just out of the pen when I met him.

Q And he didn't tell you that?

A No.

[127] Q Somewhere along the way, you got information about it?

A Yes.

Q Does LaRoyce have a nickname?

A Yes.

Q What's the nickname?

A Trody.

Q What does Trody mean?

A Nothing specific. My oldest son had a friend that just started calling him Trody when he was a baby, and it just hooked up to him. Everybody just started calling him Trody.

Q He got a nickname and it just—

A Beg your pardon?

Q He got a nickname and it just stuck?

A Yeah.

Q Now, where was Trody born?

A St. Paul.

Q Here in Dallas?

A Yes.

Q When he was born, do you know whether or not there was any type of physical problem that he had?

A He was real nervous and he had to remain in the hospital two days after I was released.

Q What about anything else physical about him?

A Oh, he had a defect in his walking we noticed [128] after he started. He walked like this (indicating) after he started walking, they call it knock-knee splint something.

Q And as a result of that, was he taken anywhere for any type of treatment?

A Yes.

Q Where was he taken?

A Scottish-Rite.

Q And what type of treatment did he receive at Scottish-Rite?

A He had to wear sleeping braces and a shoe with a bar on it.

Q When you talk about braces, obviously, you're not talking about the kind on your teeth?

A It was made like an "H" that I had to put on him, and then the shoes had a bar at the bottom of them, and he had to sleep in them, even during the times he had naps.

Q Now, when Trody was pretty young, did he start some type of a kindergarten or education program?

A Head Start.

Q The Head Start program, where was it located?

A We lived in West Dallas, Dallas West Apartments, and the office part they had this Head Start that—I think it's sponsored by the state.

Q As a matter of fact, did you try to get involved in that program?

[129] A Yes, I used to do volunteer work down there. It was a program like, you know, at feeding time they would put their food on the table just like you do at home on the dinner table and teach them how to eat and all this. It was a lot of things advanced him.

Q Now, where did Trody go to elementary school, ma'am?

A T.G. Terry.

Q Is that here in Dallas?

A Yes. Greenspan.

Q When LaRoyce was at T.G. Terry right at the first grade level, was he tested for a learning disability?

A Yes.

Q Was that something that they just came up, or is that something that you had a concern about and asked them to look at?

Q How did that come about?

A No, they told me that he was kind of slow, and so I asked them, you know, to test him. I think the school—through the school, they do it anyway, so they found out he was slow in his reading, and I asked them to keep him back in first grade because I didn't want them to push him through.

Q Trody, as a matter of fact, had a bunch of tests done at that early age; is that correct?

A Yes.

Q Now, in terms of actually being examined by a [130] physician, were you ever given information that Trody might have an organic brain problem?

A No.

Q If that's something that the school knew they—for whatever reason, that wasn't shared with you, was it?

A No, it was—if they did, I don't remember it.

Q When it was—when you were told that Trody was going to be a slow learner or was a slow learner, did that surprise you in any way?

A Yes—well, not really, because his daddy is a slow learner, so I thought it was just maybe genetic.

Q And he, in essence, failed the first grade?

A Yeah. Well, they were going to promote him and I asked them not to because he needed to, you know, repeat it. I thought he would probably do better the next year.

Q Now, after elementary school, where did he go?

A Hulsey.

Q And that's the same place, I believe, you indicated that your daughter goes to now; is that correct?

A Yes.

Q During this time that he's in elementary school and in the middle school, he is in the special education program; is that correct?

A Yeah.

Q Now, the special education program, do they [131] maintain conferences with you and tell you what the prob-

lems were, or did you just know that's something they were putting him in?

A No, they would keep me informed.

Q Now, when he was in middle school, did he play football?

A Yes.

Q Do you know whether or not he played any other sports?

A I think he took track during track season. He shot some big disc like deal he used to throw.

Q What about—did he play little league?

A Yes.

Q I take it, then, at this point in time when he's in middle school that whatever physical disability that he had—

A It was—

Q —very early, it was corrected?

A Uh-huh.

Q When Trody was growing up, did you all give him any type of religious training? Was he taken to church or anything?

A Yes. When he was about three months old, he was blessed in the Baptist Church with his godparents and all, and he used to go to church with me.

[132] Q As a matter of fact, at least on some regular basis, Trody went to church for most of his adult life, or most of his life; is that correct?

A Well, when he was smaller, then when he tried to work, he didn't go as often.

Q Now, how old is Trody?

A He's 20 now.

Q As a matter of fact, he turned 20 during the jury selection process; is that correct?

A Yes.

Q So, at the time of this offense, then, he was 19 years old?

A Yes.

Q What is his birth date, ma'am?

A April 23rd, 1971.

Q Now, when Trody was at Hulsey, did he play football?

A Yes.

Q Do you know what position he played?

A Nose guard, I think. I'm not sure.

Q Did that particular group of youngsters, did they do particularly well?

A Yeah, they—last year they won every game. They didn't lose a game. They went to state and everything. No one made a touchdown on them the whole year.

[133] Q And was that something that, I assume, all the team members were particularly proud of?

A Yes.

Q Now, ma'am, did Trody—can you tell the jury where Trody went to high school?

A He went to Carter, then he dropped out, then he left—his dad and I separated, so he was trying to, I guess, get his life together, and he went to Louisiana where his—he's got a grandfather there and uncles and aunt, and he—I don't remember the name of the school there that he attended, but he had had an accident during the football season at Hulsey and he had to have surgery on his knee, so I had to bring him back here and have surgery. So after he came back, he just remained here.

Q Let me back up a little bit on that. Is that the Groanoke High School—

A Yes.

Q —in Louisiana? That's in Shreveport, is it not?

A Yes.

Q When Trody was at Carter High School, did he get to play football there?

A Yes. His freshman year he played, and then the next year they wanted him to play varsity and junior varsity and the coach asked me about it, but I told him I wasn't sure

because I didn't feel like Trody could keep his grades up, and [134] this was more important than football, so the coach called me on my job and told me if I would consent to him playing that he would make sure and get him a tutor and everything, you know, so his grades would maintain, but they didn't do that. They lied to me. So after he didn't make his grades, he couldn't play.

Q And it's a situation that his knee was injured somehow?

A His knee?

Q Was it his knee, ma'am, that was injured?

A His knee was injured when he was in the eighth grade, but it didn't really start bothering him real bad until his sophomore year.

Q You had indicated that Trody went to Louisiana because he was trying to get his life together. Now, this was back in what, 1988?

A Yeah, '88. Yeah, '88, '89. I'm not sure. I've got—I knew me and his dad was separated.

Q Let's talk about that. How long had you and his dad been married?

A Oh, we been married 19 years now—well, 20.

Q And do you know or is—do you know why you all separated or why you wanted to get away from his dad?

A He had joined a motorcycle club called the Hornets and he was vice president. He got involved with that, women, [135] booze and drugs.

Q Now, in terms of drugs, do you know what type of drugs your husband was using?

A Crack cocaine.

Q Now, as a result of him being on crack cocaine, did that change the attitude that he had with his children and his attitude that he had with you?

A Yes.

Q Prior to that time, how was -- how did Trody get along with his dad?

A They didn't get along.

Q I'm talking about prior to you all's separation.

A Oh, before?

Q Yes, before.

A Yeah, they were good friends. He used to take him everywhere. When he first bought his bike, he used to take him riding. He used to tie him on the back and they would go to Shreveport and different places. He would tie him on there so he wouldn't fall off just in case he got sleepy.. And then after he got involved in the motorcycle club, he ditched him, and that hurt him.

Q In terms of when he joined the motorcycle club and got on crack cocaine, did you start noticing things were missing around the house?

A Yes.

[136] Q What all of a sudden started showing up missing?

A He took my daughter's T.V. He took our T.V. from the bedroom and sold it.

Q When you say he, who are you talking about?

A Leroy.

Q Your husband?

A Yes.

MR. LUCAS: Your Honor, our only objection would be the relevancy to this particular hearing involving the husband and the drugs and the thefts. We object it's not involved in this hearing in this phase.

THE COURT: Let me see the attorneys at the bench for just a second.

(There was an off-the-record discussion held at the bench, out of the hearing of the jury and court reporter, after which the following proceedings were had:)

MR. LUCAS: We'll object to it, Your Honor.

THE COURT: I'll have to overrule your objection.

Q (By Mr. Manasco) Ma'am, I think you were at the point where you were telling us that things that you all had worked and earned for at the house were being stolen by your husband; is that right?

[137] A Yes.

Q What was taken from your place by your husband?

A The deep freezer.

Q The deep freezer?

A Yes.

Q All right.

A I used to sell Tiera glassware.

Q What type of glassware?

A Tiera.

Q What type is that, ma'am?

A It's a glassware. It's pretty expensive. I used to sell it, and I had over $2,500 worth of glassware that I had won for being top salesman, and all of it came up missing.

Q Did you find out that your husband had sold it?

A Yes.

Q Was he selling it for drugs?

A Yes.

Q Did it get—can you tell the jury, when you realized all this stuff was missing and your husband was stealing it, what did you have to do in order to protect your own and you children's own property?

A My son, he lives in Mesquite, my oldest son, I had to—he came over and got—and took the VCR. He took my microwave, and I had some glass demijohns that cost some hundred dollars apiece that I had won. He had to take all [138] them over there, too.

Q What are demijohns, ma'am?

A Glass jars. Jars stand about this high (indicating) from Tiera that I won.

Q You gave them to your son to take?

A Yes.

Q Where was he going to take that?

A To his house.

Q Why?

A Because my husband was going to sell it. He would sell anything he could get his hands on to get money for drugs.

Q When all this was going on, did that have an influence or impact on your son, Trody?

A Yes. He was really upset about it. Even my daughter, we all were upset about it. So there should be police reports where I had called trying to get him out of the house, and I finally—he finally did leave.

Q When you say he left, you talking about your husband?

A Yes.

Q And did he move in with another woman?

A Yes.

Q And Trody found out about that, did he not?

A Trody knew about the woman all along.

* * *

[11] anyone, we would like to know about that.

MR. LUCAS: I know many people with the organization purely on a professional basis, and I'm not aware of any reward and I've not talked to Mr. Barrett in many months.

MR. SCOTT: That was just in an abundance of caution. I have no reason to think otherwise.

MR. MANASCO: Your Honor, our next witness that we anticipate to call is the defendant, LaRoyce Smith. We would like the Court's permission for me to make brief inquiry to make sure that it's abundantly clear that he is aware of his rights and that any decision that's made concerning where he does or does not want to testify, truly reflects his desire to present certain evidence in front of the jury. If we could make brief inquiry on that.

(Defendant sworn.)

LAROYCE SMITH, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

SUB ROSA EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, sir?

* * *

[34] Q Let me jump now to high school and ask if you went to Carter High School?

A Yes.

Q All right. That's here in Dallas?

A Yes.

Q How far did you get in Carter?

A 9th.

Q Now, you were, what, 18 years old when you were in the ninth grade?

A Yes.

Q Okay. Now, most people are either seniors or hitting college where they are 18?

A Yes.

Q You were in, what, the ninth grade?

A Yes.

Q Did you play football at Carter?

A Yes.

Q Tell us about that.

A I played my first year I went to Carter, and after that year was over, the coach, Freddy James, he asked me to come to varsity to play. And I believe that same year I had failed, and he gave a call to—that next year came, he gave a call to my mother and told my mother that if she'll let me play, he'll make sure that—he'll tutor me hisself and make sure I got my grades. And I played, and I believe I failed [35] again, I failed a class and my mother made me stop.

Q Did you go to school in Louisiana for Groenoke High School?

A Yes.

Q All right. And was that, again, I guess part of the ninth grade?

A Yes.

Q All right. When you went to—why did you go to Shreveport?

A Well, I went because I told my mother that I wanted to start over and get my education back the right—and she said—she told me—well, she said, "You're older than"—she said, "You're too old to go back to school." She said, "You're going to have to study for your GED" and, you know, continue that away.

And I told her that I wanted my high school diploma, and I told her that I wanted to go to Louisiana in order to get away.

Q All right. Now, was this during the time when you and your family were having some problems?

A Yes.

Q Did you get to play football in Shreveport?

A No, sir.

Q Okay. Did you want to?

A Yes.

[36] Q Why didn't you get to play?

A Well, I enrolled too late down there in Groenoke High School.

Q Did you do anything with the team or try to prepare in case you could play in the future?

A Yes.

Q What did you do?

A Well, coach, I believe his name was King, he had me to lift weights every day and to work out every day.

Q So you were doing that even though you weren't even on the football team?

A Yes.

Q All right. Hoping that one day you might be again?

A Yes.

Q Now, in terms of the time when you went to Shreveport, can you tell the jury what you knew about your father and—your father and your mother having problems?

A Well, I just know that my father and my mother, they used to argue all the time.

Q All right. And did your father ever hit you or anything?

A No, sir.

Q Did he ever threaten you with any type of weapon or anything?

[37] A He pulled a knife on me once.

Q When did he do that?

A My mother, she had bought her a '88 Ford Tempo, and we had a '79 Grand Prix, and my mother gave it to me and she told me I could drive it and have it fixed. I had to

have it fixed in order so I could get my license. And so I was working, I believe, at Wyatt's, and I bought an alternator and a battery and some tires and I believe, the muffler, something was wrong with the muffler, and the brakes was broke, and I had them fixed.

And so my father came home from—he had been gone about three, two or three days, and he came home. And him and my mother got into it over the Grand Prix.

And he told her that, "You have a car." You know, "Let me have this car."

And my mother said, "No," she gave it to LaRoyce.

So my father said, "LaRoyce, give me the car keys."

And I said, "No, my mother gave the car to me, and I went and bought all the equipment for it."

And so he said—he took the keys and went outside to leave. Well, my mother caught him behind the grand Prix.

And I said, "No, you can't have it. Mother gave it to me." I said, "Let me take my stuff off of it, then you [38] can have it.

Then he started to jack it up. Well, he went to the trunk and got the thing that you jack the car up and he put that on. And then we had a garden hose in front of the yard, and I picked that up, and he ran in the house and got a butcher knife. He told me I better drop the garden hose or he was going to hurt me. So I didn't drop it, and he left.

Q You said that your parents were fighting and arguing. Did you see this?

A Yes.

Q How did it make you feel?

A Well, it wasn't too happy for me or my sister.

Q What did your sister do? What were you all doing when you all would hear them arguing?

A Well, my sister, she would cry and run up to her room. Well, she would first tell—she would say, "Stop, Daddy."

And he would say, "Go to your room," and she would go to her room.

Q Now, did you know that your dad was stealing from you all to support his crack habit?

A Yes.

Q All right. Did you know anything in particular—were you there when he actually stole something from the house that was going to be used to buy some drugs?

[39] A Yes.

Q Tell the jury about that.

A Well, me and my sister were there, and I believe that day he had came, my mother called the police and the police told him to leave and not come back until she come back. He left and he came back with another guy, and they came and he unplugged the deep freezer and put the deep freezer on this dolly, him and this guy.

And I said, "What are you doing?"

And he said, "I'm taking my deep freezer."

And I said, "That's my mother's deep freezer."

And he said, "No, this is my auntie's deep freezer, my aunt." He said his Aunt Rosy gave it to mother, and he said he's taking it back. He put it in this guy's truck and they left.

Q Did you know that your mama had to take other things that maybe could be pawned or sold to her other son's house to keep your daddy from stealing from you?

A Yes.

Q Did you ever see your dad on drugs?

A No, just drunk a couple of times.

Q Did the relationship that you have with your father, did it change during this period of time?

A Yes, it changed.

Q Tell us about that.

[40] A Well, when he first joined the motorcycle club, they would have events like motorcycle racing and some event called the drinking event, who can drink the bottle up first. It would be like a bottle about so tall of Thunderbird, and they will drink—who can guzzle it and be the first one to drink it up, and he used to take me to those events. Then once a couple of times after that, he just stopped taking me.

And I asked him, "Could I go?"

And he said, "No."

Q And did he go to—did you have a pretty good relationship with him before this?

A Yes.

Q Okay. And after this, after he started stealing from the family and doing the crack, how was your relationship with your dad?

A We would argue and fight all the time.

Q How did it make you feel?

A Well, it wasn't joyful.

Q Do you remember the first time that you ever got a part-time job?

A Yes.

Q How old were you?

A I was actually 15, but I believe it was a couple weeks before I turned 16. And my brother had a friend named Byron, he was a manager at this—at Wynnewood—in

* * *

Defense Closing at Guilt/Innocence
Excerpt: Vol. XXX: 27-29

CLOSING ARGUMENT

BY MR. MANASCO:

Members of the jury, I told you Monday this would not be a pretty case to listen to, pretty case to watch, and it wasn't. You know when we started picking the jury—it took us four weeks to do that—and I told you all, the ones I talked to, that I wanted a smart juror and I wanted a jury that would give us a fair shake, that wasn't on anyone's team, that wasn't a last link of law enforcement, that would give us our due, that would listen to the evidence, apply the facts to the law the judge would give you and come up with a just decision. Justice. That's what this is all about.

I told you Monday that the State has built its case upon people who should have been here on trial themselves but weren't.

Broadnax. Investigator Broadnax, "Yeah, I filed capital murder charges on Kevin. It was fair."

[28] Devario, their star rebuttal witness, "seems fair. We should all be in the same boat."

I have to speak now. I know that I would probably give up almost all of the time I had left for five minutes after Mr. Lucas, but that's not what the law says. The law says that they have the burden of proof, they have the right to close, and just because I can't get up and I've got to sit over here and be quiet doesn't mean that there's not an answer to what he has to say.

I told you I wanted you all to listen with a critical ear to the testimony, and I know you did. I'll ask you all to use that same critical ear when you're answering and discussing Mr. Lucas's comments.

You know, every case seems to have some kind of a theme, seems that way, at any rate. What's the State's theme? Well, they build their whole case around their assumption that LaRoyce is the ring leader. That's just what Mr. Nancarrow just got through talking to you. Says he's the one who worked there. He's the one charged.

You know, when you look at all the evidence and compare the two, they tell you LaRoyce is calling all the shots. Yeah, right. Let's look at it. Who's been to college? Remember Kevin? Kevin got kicked out of El Centro for having a gun, they said. LaRoyce has been in special ed since he started school. LaRoyce is the one who flunks the [29] first grade after he's been in Head Start since he was three years old. LaRoyce is 19 years old and he's in the ninth grade. Yeah, he's the brains.

Who's been robbing and in the robbing business? Well, Kevin. There is no dispute about that. All the witnesses truck up there and say, "Yeah, Kevin robs those dope houses, and he brags about those 7-Elevens." Bragging seems to be a trademark of Kevin Shaw. That will become obvious.

Reasonable deduction from the evidence, LaRoyce Smith does not have any felony convictions at all, doesn't have any crimes of moral turpitude, or they would have brought them out.

These people aren't stupid, they're the best and the brightest, and that's why they're trying a capital murder case.

Who wants a gun? Kevin. That makes sense, doesn't it? Did that seem like a lie when he said, "Yeah, Kevin told me to go get a gun"? He even tells you where he got the gun. If they wanted to—they've got three lawyers over here, no telling how many investigators, two police departments, DeSoto and Dallas. If they wanted to bring that gun—they told you his name, would have told them their address, phone number. They could have called and said, "No, huh-uh, no, oh, Trody

said he was going to do some serious robbing. He was going to do some killing, kill some girl."

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 2, 10-11 (Nicks)

PROCEEDINGS

Tuesday
June 11, 1991

MR. MANASCO: Your Honor, the Defense would call Reverend Nicks. I do not believe this witness has been sworn, Judge.

(Witness sworn.)

SAMUEL NICKS, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, sir?

A My name is Samuel Nicks.

Q All right. Mr. Nicks, can you tell the jury what you do for a living or occupation?

A I am pastor of the Lighthouse Gospel Center Church in Dallas.

Q Where is that located, sir?

A That's at 1730 South Ewing Avenue.

* * *

[10] Q Now, Reverend, in terms of possible rehabilitation, do you think what you know about LaRoyce that he is capable of being rehabilitated?

A Most definitely.

Q Now, Reverend, I think you had—something I didn't know about before, but when we were talking in the back, you indicated to me that you were raised basically in a ghetto-type environment; is that correct?

A Yes.

Q Is it a situation where even though maybe they don't have the best shades of life, that they can come out of adversity and make something of their life from that?

A Yes.

Q You talk about that in your services, sir?

A I try to portray a self-image and instill some type of vision in everyone because so many kids that are in the inner city have a tarnished self-image, they're already labeled at what you're supposed to be. People label you, they address you as what they think you are, and when those things are planted, those things have a tendency to grow.

Q Now, Reverend, were you aware that LaRoyce's parents were going through some serious problems a couple of years back?

A Yes.

[11] Q Okay. Well, are you also aware about his situation where his daddy was stealing from the house to support his crack habit?

A Yes.

Q All right. So, that's something that you were made aware of back then; is that correct?

A Yes.

Q All right. Reverend, when a family is going through a situation like that, based upon your counseling and life experiences in particular as a minister, someone who's trying to help get people's lives back together, can you tell the jury whether that type of situation tends to have an adverse effect on the children?

A It does, because children usually have an identity crisis. When the male figure in their life acts up, it's a situation where a child is going through rebellion anyway, between the ages of 16 and 21, and family troubles definitely affect the children.

Q I guess, basically; just to sum it up, do you think there is worth in value to LaRoyce Smith?

A I most definitely do. I think that LaRoyce is a good person. I think he has qualities that have not come out and I think that he would be a help to society in the future.

* * *

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 14-49 (Pingle)

[14] MR. MANASCO: Your Honor, the Defense would call Alberta Pingle. Your Honor, this witness has not been sworn.

(Witness sworn.)

ALBERTA PINGLE, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, ma'am?
A Alberta Pingle.
Q All right, Ms. Pingle. Can you tell the jury what you do for a living or occupation?
A I'm an employee of the Dallas Independent School District, and I work for the special education department.
Q What is your title or role in the special education department, ma'am?
A I'm a specialist and I'm responsible for the operations of the special education department including budget planning and records.
Q Okay. Ma'am, did I ask you to come down to review certain records?
[15] A Yes, sir.
Q Now, the records I showed you are on blue xerox paper, and I think you indicated that when I was out—although I didn't talk to you at the time, I was told about your blue paper yesterday, that was your idea to put stuff on blue paper; is that correct?
A Yes, due to funding restraints.
Q Okay. So, you wanted to use whatever paper you had?

A That is correct.

Q So, even though maybe the original records are not on blue, have you gone through all the records—well, I'll show them to you again, but all the records you've gone through, you have initially indicated that you have compared them with the originals and that these are, in fact, true and correct copies?

A Yes, sir.

Q I think you even put your initials on the top of all of them; is that correct?

A Yes, sir, it is.

Q Ma'am, some of the records I'm going to show you, they'll have certain pages and then they'll have test results that maybe are not attached, but you have the entire file at your disposal; is that correct?

A Yes, sir.

[16] Q All right. Mr. Lucas has talked to you about some records; is that correct?

A Yes, sir. Just a moment. Who is Mr. Lucas?

Q I'm sorry. It's the man right here (indicating).

A Yes, sir.

Q So, if there's anything unusual about the records that can be clarified, you have everything with you; is that correct?

A Yes, sir.

Q All right. Thank you, ma'am. Let me show you what's been marked and clipped with a red clip as Defendant's Exhibit 38. Instead of marking them all individually, looking at them as a batch, if you'd just look through that, first of all, and see if all those have your initials on them and those are the records you looked at and compared them with the original to make sure that they're true and correct copies.

A Each one has my initials.

Q So, you don't have any problem with that, at least the documents are the ones that you have looked at and

compared to make sure they are accurate with the official records that they come from, they're xerox copies; is that right?

A Yes, sir.

Q Ma'am, the records contained in Defendant's Exhibit 38, are these records that are kept on a—at the [17] special education department?

A Yes, sir, at E. D. Walker Special Education Center.

Q Now, where is that located?

A 12532 Nuestra Drive in Dallas.

Q Okay. Are these records kept on a day-to-day, week-to-week, month-to-month basis?

A Yes, sir, by board policy.

Q Are these records—

MR. LUCAS: Judge, we have no objection—without laying the predicate, if they intend to offer them.

MR. MANASCO: Your Honor, we'll offer into evidence Defendant's Exhibit 38.

MR. LUCAS: No objections.

THE COURT: It has been admitted.

(Defendant's Exhibit Number 38 admitted into evidence.)

Q (By Mr. Manasco) Ma'am, let me show you what has been marked on the first page of Defendant's Exhibit 38 and ask if this is dated 4-14-78; is that correct?

A Yes.

Q Okay. Is this a sort of analysis sheet that was conducted back then or written back then; is that correct?

A That's correct. That's a teacher's report.

Q Okay. Can you read for the jury these first two [18] paragraphs, please?

A Yes, sir. "Attendance regular performance, nil; progress, nil; very low retention; has not learned all letters;

cannot read simple words; cannot preform number functions beyond counting; good speech; fair handwriting; does not know address, birth date; fair interaction with peers; is a little rough, but enjoys his friends; must be kept separated from a few because he's easily led into trouble."

Q What does the last paragraph read, ma'am?

A "Very hesitant to respond to teacher's questions on request; speaks in whispers; tries to control actions at teacher's request, but sometimes fails; has received corporal punishment twice."

Q Corporal punishment is spanking?

A I can't say.

Q You don't know?

A I'm assuming that that would be, but I can't say.

Q All right. Let me show you Defendant's Exhibit 39 and ask you if this is a chart that was prepared that indicates some of the phrases on there. Are those phrases on Defendant's Exhibit 39 contained on the first page of 38?

A Yes, exactly.

Q All right. Even to the misspelled words—

A Even to the misspellings. I'm sorry you pointed that out.

[19] Q Now, a teacher wrote that, didn't she, ma'am?

A That's correct.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 39.

MR. LUCAS: Judge, we're going to object to Mr. Manasco's notes and everything. The records speak for themselves. We have no objection to the witness saying anything, but the personal chart of Mr. Manasco, we do object to.

THE COURT: Objection is overruled. It will be admitted.

(Defendant's Exhibit Number 39 admitted into evidence.)

Q (By Mr. Manasco) Ma'am, the jury is going to get all of this, but this is little bitty and this is a lot bigger, okay?

MR. LUCAS: Again, we object to the great big when the little bitty is in evidence, Judge.

THE COURT: Objection is overruled. I've already made my ruling.

Q (By Mr. Manasco) So back—at least in terms of what I'm presenting, back on 4-14-78, the first document that I'm concerned with, it indicates nil, meaning what? What does nil mean to you?

A Nothing.

[20] Q All right. It also indicates that he must be kept separated from a few because he's easily led into trouble; is that correct?

A That is what it says.

Q All right. Ma'am, let me direct your attention to the next document which is going to be 10-6 of '78. Is this a history and physical examination document?

A Yes, sir.

Q Okay. Is this notation made by, apparently, a physician, Richard M. Adams?

A Let's turn to the back to see exactly who did it.

Q Yes, ma'am.

A Yes, sir.

Q Okay. One of the—on page four of four is indicating medical diagnosis of slow learner?

A Yes.

Q Okay. Let me show you Defendant's Exhibit 40. Does that indicate the date the medical diagnosis of slow learner?

A Yes, sir.

MR. MANASCO: All right. Now, I would offer into evidence Defendant's Exhibit 40.

MR. LUCAS: The notations of counsel are clearly not admissible and we would object to it because we're not allowed to do that.

[21] THE COURT: Objection is overruled. I'll give you an opportunity to do that with any of your documents.

MR. LUCAS: Judge, our witnesses have all gone home from the first phase of the trial, and it's kind of late.

THE COURT: Let me have the jury step back into the jury room for just a moment.

MR. LUCAS: Well, we withdraw the objection.

MR. SCOTT: Object to side bar—

THE COURT: Let me have the jury step into the jury room for just a moment.

(The jury panel was retired from the courtroom, and the following proceedings were had:)

THE COURT: Record reflect the jury is not present at this time.

For the record, I assume Mr. Manasco learned this technique at the same prosecutor school we attended when we were both at the district attorney's office, so it is something that is known to the prosecutor or has been used by the D.A.'s office in the past, and I've never seen a problem with it and I don't see a problem with it in this instance, so I'm going to allow it.

I'll give you a running objection to the entire range of use of these types of documents.

[22] MR. LUCAS: We do renew our objection, Your Honor.

THE COURT: Yes, sir.

MR. LUCAS: Note our exception.

THE COURT: Yes, sir. We're ready for the jury.

MR. LUCAS: I'm not sure Mr. Scott was the trainer there or who, but we object to it.

THE COURT: We're ready for the jury.

(The jury panel was returned to the courtroom, and the following proceedings were had:)

Q (By Mr. Manasco) Ma'am, let's jump to the next document which is 4-27-81. Does this tend—what is this document?

A Developmental and sociological survey information.

Q Is this information that is retrieved from the parents?

A That's correct.

Q Where it asks, what problems are seen by the parents, can you read what this says, please?

A "He is slow and has difficulty remembering what he has learned."

Q All right. That was back in '81; is that correct?

A Yes.

[23] Q 4-27-81?

A Yes, sir.

Q All right. Defendant's Exhibit 41; is that what that says?

A Yes.

MR. MANASCO: We would offer Defendant's Exhibit 41.

MR. LUCAS: Respectfully object to counsel's notes being admitted into evidence.

THE COURT: Overruled.

(Defendant's Exhibit Number 41 admitted into evidence.)

Q (By Mr. Manasco) Now, the 78 is a medical diagnosis; is that what that says?

A Yes, it is.

Q All right. That's by that Dr. Adams or whatever—
A Yes, sir. Richard Adams.
Q Who is Richard Adams?
A He is the director of health services for the Dallas Independent School District.
Q In '81, this is what his mama says, that he's slow and has difficulty remembering what he learned; is that correct?
A Yes, sir.
[24] Q All right. Ma'am, let me jump now to 5-20-81 and ask what this document is.
A Admission Review and Dismissal Individual Education Plan Committee Report.
Q What does it mean when it says committee report?
A By federal and state regulations, decisions about a handicapped student's schooling must be made by a committee consisting of prescribed members.
Q How many people have to agree that someone has a learning problem?
A At that time, it did not have to be consensus, so that there could—the persons on the committee did not have to agree.
Q Okay. Now they do?
A Yes, they do.
Q Okay. Everyone that agrees signs off on this; is that correct?
A Yes, or disagrees, they sign off.
Q Fair enough. In terms of this, when it has a review of an individual evaluation, it has them checking off certain things; is that correct?,
A Yes, sir.
Q All right. On his form back on 5-20-81 in terms of the things that are checked off, what is checked off?
A Checked off the date of the medical—
[25] Q I'm sorry. I'm talking about down below.
A It indicates that an assessment was done and that the

child has been found to be learning disabled and speech handicapped.

Q All right. In terms of if he's—if you multiply the handicap—I guess that means that there's more than one handicap.

A More than one.

Q What is a primary handicap?

A Primary handicap is learning disabled.

Q Is that abbreviated L.D.?

A Yes, sir.

Q Secondary is what?

A Speech.

Q The next page, ~~does it indic~~ate what special education classes they're putting him in?

A Yes, sir.

Q What are those?

A Language arts—no, excuse me—reading.

Q Okay.

A And speech therapy.

Q Reading and speech therapy?

A Yes, sir.

Q All right. The social studies is not a special ed class?

[26] A No, sir.

Q All right. Well, let's mark that out. There's a little arrow; is that correct?

A Yes, sir.

Q So, where it has special ed social studies was listed, but apparently, that's not one of the classes.

A Yes, sir.

Q Okay. All right. So—

A Neither is language arts.

Q Oh, that's not one either, okay.

A No.

Q All right. You see why there's a blob there, correct?

A Yes, I understand how you could misconstrue that.

Q All right. So, reading and speech therapy, right?

A Correct.
Q So, Defendant's Exhibit 42, that's what it says?
A Yes.

MR. MANASCO: We offer into evidence Defendant's Exhibit 42.

THE COURT: Same objection?

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 42 admitted into evidence.)

[27] Q (By Mr. Manasco) Ma'am, I wore my contacts too long and I'm having to wear glasses, but you can—at least in terms of the way the forms are, you can see how that could be an honest mistake; is that right?
A Absolutely. I had to look twice.
Q All right.

MR. LUCAS: Judge, renew our objection on that. There's clearly wording on there that has no application to this case.

MR. MANASCO: I marked it out, Judge.

THE COURT: Objection overruled.

Q (By Mr. Manasco) About 9-15-81, first of all, what is this particular examination?
A History and physical examination.
Q Is this—we've seen that before, haven't we?
A We've seen this form before.
Q Okay. Who is this done by?
A Richard Adams.
Q Is he the same guy you talked about before?
A Yes, sir.
Q All right. On the medical diagnosis, it's marked down—it says impression; is that correct?
A Yes.
Q It has what?

A L. problems.

[28] Q All right. You know what that means?

A Learning problems.

Q All right. When it has explanation, can you read what it says there?

A "Possible organic cause for learning problems. See number five."

Q All right. Organic cause?

A Yes.

Q All right. What's organic?

A Physiological.

Q Okay. So 9-15-81, it indicates possible organic cause for learning problems; is that correct?

A Yes.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 43.

THE COURT: Same objection?

MR. LUCAS: Same objection.

THE COURT: Will have to be overruled.

(Defendant's Exhibit Number 43 admitted into evidence.)

Q (By Mr. Manasco) Now, this possible organic cause, that is a notation by the physician; is that correct?

A That's correct.

Q All right. Dr. Adams, all right. Let's jump to 9-18-81, and ask if this is another committee report?

[29] A Yes, sir.

Q Can you read to the jury what the first paragraph when it talks about his—what the analysis is.

A "Peabody Picture Vocabulary Test—Revised demonstrated a three-year, six-month deficit as compared to chronological age in the area of receptive vocabulary skills. The TOLD"—t-o-l-d.

Q What is that?

A That is a language test that—I can't tell you what it stands for.

Q Okay what does it say about it?

A "Also demonstrated the same measurable deficit and also indicated a severe deficit in grammatic completion. A two-year deficit was demonstrated in oral language."

Q Is that what Defendant's Exhibit 44 says?

A You have a misspelling, and, for once, it's yours—

Q Uh-oh—

A —not the teacher's.

Q —where is this?

A Chronological.

Q I didn't write this. They can't read my handwriting, ma'am, so I had to have someone do it, but other than chronological misspell, I just put "sp," that's the abbreviation for misspelled, isn't it?

[30] A Uh-huh.

Q How embarrassing. Is it still the—

A Well, you pointed the one out for us, we're even.

Q Is it still accurate?

A Yes.

Q All right.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 44 with apologies to the Court.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 44 admitted into evidence.)

Q (By Mr. Manasco) Have you ever heard the phrase, "You just can't get good help these days," ma'am?

A Yes, sir.

Q Ma'am, let's jump to 5-25-82, at least it's stamped 5-25-82, and again, is this an annual review?

A Yes.

Q In terms of comments, what does it say in terms of comments?

A "Referral is being made for psychological consultation."

Q All right. So, they're trying to now have some sort of psychological consultation—at least requesting that?

[31] A Yes, sir.

Q Again, Defendant's Exhibit 45, is that what that says?

A Yes, with exception to the spelling.

Q Oh, what did they misspell?

A Psychological.

Q I'll kill them.

MR. SCOTT: Let the record reflect, I was not the scribe.

Q (By Mr. Manasco.) Well, I'm sorry about that.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 45.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 45 admitted into evidence.)

(By Mr. Manasco) Let's jump to 5-26-83, the committee report, at least it's stamped 5-26-83. Here we go, on this page, does it indicate whether or not the student did or did not meet the specific eligibility criteria for learning disabled and speech?

A Yes, it does.

Q It indicates that he did or did not?

A That he does meet the specific eligibility criteria.

[32] Q On the next page, does it indicate whether or not he needs special education services because of the handicapping conditions cited above?

A Yes, sir.

Q It indicates he does or does not—

A He does need.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 46.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 46 admitted into evidence.)

Q (By Mr. Manasco) Let's jump to 5-24-84.
A You indicate 4-25.
Q Oh, 4-25, okay. Oh, I see there's actually three different dates and one's marked out. I'm really not sure what the date is, but one is 4-25-84; is that correct?
A That is correct.
Q Is this another one of the committee reports?
A Yes, sir.
Q Is there a notation in terms of what the committee decision was in paragraph three?
A The committee decided that this student needs special education services because of the handicapping conditions cited above.
[33] Q All right. Is there a handwritten notation in the—
A "Continues to need special education."
Q Is that what that says on Defendant's Exhibit 47?
A Yes.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 47.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 47 admitted into evidence.)

Q (By Mr. Manasco) Ma'am, let's jump to 3-22-85 and ask if this is yet another committee report?
A Yes, sir.
Q All right. Now, in terms of assessment records, does it indicate abbreviation of WISC-R?

A Yes.
Q All right. What is that?
A The Weschler Intelligence Test or Scale—
Q All right—R—
A Revised.
Q I.Q. test?
A Yes.
Q All right. Does it indicate what his verbal I.Q. score is?
[34] A Yes, it does.
Q What is that?
A Seventy-five.
Q What's his performance scale?
A Eighty-four.
Q What's his full scale I.Q.?
A Seventy-eight.
Q Is that what it indicates in Defendant's Exhibit 48?
A Yes, it does.

MR. MANASCO: Offer into evidence Defendant's Exhibit 48.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 48 admitted into evidence.)

Q (By Mr. Manasco) Now, ma'am, are you aware that 70 is the cut-off for clinical mental retardation?
A It depends upon the individual test.
Q So, if someone had an I.Q. of 70, and perhaps some other factors, they are clinically, or whatever the diagnosis, being mentally retarded; is that correct?

MR. SCOTT: I'm sorry. I didn't hear that answer.

THE WITNESS: I didn't answer.

[35] A I can only attest to what it states in the State Board of Education rules, which indicates two standard deviations below the mean on any tests on intelligence.

Q (By Mr. Manasco) So, in terms of what the clinical analysis is or whatever, you don't really want to testify to that?

A No, sir.

Q Fair enough. Let me jump to 5-28-86. Does that indicate in the handwritten notation that he is to be phased out of special ed?

A The student was recommended to be phased out of special ed at the end of 1986 school year.

Q Okay. Now, three pages later, where it has the committee considers whether he should—whether he met the goals and objectives and what program he should be in, it checks "regular education" only, right?

A Yes, sir.

Q There's also something written down under special education, it's marked out, correct?

A Yes, sir.

Q It also talks about the committee recommends placement in and a blank, that's marked out, correct?

A Yes, sir.

Q I didn't—that's on the form, right?

A That is correct.

[36] Q Okay.

A That's on the original.

Q All right. It indicates at the bottom of the last page in this whole packet—can you read that last sentence?

A The part that has been crossed out?

Q Uh-huh.

A "LaRoyce has failed most of his classes. He should be considered for self-contained placement." It says, "Disregard," and has the initials "ckp."

Q All that's marked out?

A Uh-huh.

Q Where it talks about failing should be considered for contained placement, marked out, right—

A Correct.

Q —disregard. Then the result of that is promotion?

A Correct.

Q All right. That's what Defendant's Exhibit 49 says; is that right?

A Yes.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 49.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 49 [37] admitted into evidence.)

Q (By Mr. Manasco) So, apparently, this comment about he's failed his classes and should be considered for self-contained placement, that's marked out as disregard, right?

A And initialed by the resource teacher.

Q Just like where it talks about whether he should be in regular or special, there's a notation under special and it's all marked out, too, right?

A That is correct.

Q So, they decided the best thing for LaRoyce is promotion, right?

A That seems to be the results of this committee, yes.

(Defendant's Exhibit 51 marked for identification.)

Q (By Mr. Manasco) Ma'am, let me show you what's been marked for identification as Defendant's Exhibit, 51 and ask if you recognize this document.

A Yes, I do.

Q What is that?

A That is a report of an individual score on the Texas Educational Assessment of Minimal Skills or TEAMS.

Q TEAMS is by—it's an abbreviation?

A Yes.

[38] Q What is that, ma'am?

A That's the state required test for graduation with state credit.

Q Did it have the results of this test and whether or not LaRoyce demonstrated a mastery of the minimum grade, nine, for mathematics, reading, and writing?

A This document indicates that he did not master the three areas.

Q All right. It specifically says no.

A No.

Q All right. That's what Defendant's Exhibit 50 says; is that correct?

A That's correct.

MR. MANASCO: We'd offer into evidence Defendant's Exhibits 50 and 51.

MR. LUCAS: Let me see which is which. We certainly have no objections to school records, number 51. On 50, Mr. Manasco's notes, we still object to.

THE COURT: I'll have to overrule that objection. Both documents will be admitted.

(Defendant's Exhibits Numbers 50 and 51 admitted into evidence.)

Q (By Mr. Manasco) So this is the whole test, right, or the test results?

A That is correct.

[39] Q So, when they ask whether or not someone has the minimum competency for mathematics, what does it say?

A No.

Q When asked if LaRoyce has the minimum competency for reading, what does it say?

A No.

Q When it says does LaRoyce have the minimum competency for writing, what does it say?

A No.

Q Now, ma'am, just like in life, there's sort of the good, bad and the ugly; is that right in many things?

A Yes, sir.

Q All right. Now, after you were out in the hall and you were reviewing the documents to make sure that they were authentic, Mr. Lucas had an opportunity to talk to you, although perhaps maybe he didn't tell you exactly who he was—but I mean, that's fine. You did not know his name, but he did have a chance to talk to you; is that correct?

A Yes, sir.

Q Mr. Lucas pointed out a couple of documents to you; is that correct—or asked about a certain—

A He asked me about specifics.

Q Okay. In terms of disciplinary problems?

A Disciplinary and attendance.

Q All right. Did you pull certain documents in [40] request to his response—or in response to his request?

A Yes, sir.

MR. MANASCO: Let's mark them.

(Defendant's Exhibits 52 through 56 marked for identification.)

Q (By Mr. Manasco) Ma'am, let me show you Defendant's Exhibits 52, 53, 54 and 55, and ask you if these are the documents you pulled in request to—in response to his request?

A Yes, sir.

Q Again, these are school records and the same manner form as everything else except they're on white paper as opposed to blue?

A Yes.

Q All right. I think I asked or mentioned, but in terms of putting on blue, that was just something you all did out there when I had them xeroxed; is that right?

A That is correct.

Q I didn't ask to be—well, you weren't there, but that's just done routinely?

A That is correct.

Q Not necessarily to differentiate between your records and the originals?

A No.

MR. MANASCO: We'll offer into evidence [41] Defendant's Exhibits 52, 53, 54, and 55.

MR. LUCAS: No objection.

THE COURT: Admitted.

(Defendant's Exhibits Numbers 52, 53, 54 and 55 admitted into evidence.)

Q (By Mr. Manasco) Let's talk about the ugly first. Can you read to the jury Defendant's Exhibit 52?

A This is a professional report by the associate school psychologist, Bethany Quinn, dated April 6th, 1982, concerning LaRoyce Smith at T.G. Terry school. "Referral for psychological consultation. LaRoyce has been implicated in numerous thefts at school this year, particularly of the speech clinician's purse. School contact with the parent indicated that LaRoyce has also been believed to be stealing at home. Speech clinician, Lori Greenberg, reported that the mother would like to have psychological consultation services with regard to acting out by taking things that don't belong to him. Family stresses are reported.

LaRoyce's usual behavior in class is exemplary and it has shocked school personnel that LaRoyce has been involved in stealing. He has admitted to theft and has cried when questioned about misbehavior."

Q Now, let's talk about the good. It says that his conduct prior to this has been exemplary; is that correct?

A Yes, sir.

[42] Q All right. It indicates that he admitted to taking the objects?

A It admitted to theft. It does not say what thefts.

Q It says his response when questioned was what?

A He cried.

Q Now, in terms of Defendant's Exhibits 53, 54, and 55, what are these?

A These are admission review and dismissal committee reports, annual reviews dated 1985, 1985, and 1986.

Q Whey did you pull those three documents out?

A Because they have notations concerning LaRoyce's behavior.

Q What do they say?

A In each instance, the question is behavioral progress. "Has student had discipline problems this year?" In each instances it was marked no.

Q So in '84, '85, and '86, did he have disciplinary problems in school, and they say no?

A That is correct.

MR. MANASCO: Thank you, ma'am. I'll pass the witness.

[43] CROSS-EXAMINATION

BY MR. LUCAS:

Q Ms. Pingle, I only have a few questions to ask you, ma'am. You and I were allowed to talk about how long this morning?

A About 20 seconds—30 seconds.

Q So, what you've testified to regarding these discipline exhibits, you didn't even tell me about them, did you?

A No, sir.

Q Okay. Just—like I say, I don't have that many questions, ma'am. Could you just tell us generally how many students in Dallas Independent School District are involved in some way in the special education program?

A About 13,000 each year.

Q This doesn't mean that these people are retarded or incompetent or anything like that, but they have some learning disabilities; is that a fair statement?

A It's a full continuum of the least significant to the most severe.

Q In fact, some of the kids are very good kids, they're rule-abiding kids that try hard, that study hard, that progress, that the school staff is able to work with and they work themselves out of this emotional problems or learning problems?

[44] A In some instances, yes, sir.

Q How many people are on the staff of the special ed program including all of the support staff and everybody in the DISD? Just an approximate number.

A About 800.

Q Eight hundred personnel—

A That includes teachers and teacher aides and their support staff.

Q —are involved in the special ed program in this school district?

A Yes, sir.

Q That's a vast—that's a huge number, isn't it?

A It's a large number, yes, sir.

Q I guess you could use more?

A Yes, sir. That is a decreasing number.

Q You and I agree that there's a big difference between learning disabilities and being street smart. You know

what I'm talking about, street smart; is that a fair statement? You can have problems learning in the schoolhouse and once you get out of the schoolhouse, you know everything that's going on around you and out on the streets. Do you hear me?

A Yes, there seems—that is—seems to be a reasonable statement.

Q The last—this TEAMS test result, do you know [45] what year that was, ma'am, what date it was?

A I believe it was dated 1987.

Q Okay.

A There's a date on it.

Q Well, there's not—is there a date—

A There's a date on the document, but not on the large document, not on Exhibit 50, but on 51.

Q If I can tamper with Number 50, what year is this?

A I would have to actually look at Number 51 to be sure, but I believe it said 1987 in the brief. Do I have it?

Q Well, I won't touch his exhibit, but did you bring certain other records with you that were not admitted into evidence?

A Yes, sir.

Q Okay. Could I *see* those, please?

A Certainly. In addition—we've admitted those. These are the remainder.

Q Again, in the 20 seconds that we talked, it's fair to say I have no idea what's in here, do I, Ma'am?

A No, you don't.

MR. LUCAS: Judge, there's no way I can look through this.

THE COURT: We'll take a break and give you an opportunity.

MR. LUCAS: I don't need a break. I'll just [46] go ahead and offer the exhibits, that way the jury would be allowed to—so if we could—

THE WITNESS: If I may, some of those are duplicates that have already been entered into evidence.

Q (By Mr. Lucas) Okay. Well, I'm sure they won't object to that.

(State's Exhibit 76 marked for identification.)

Q (By Mr. Lucas) Ma'am, if I can show you what's been marked State's Exhibit Number 76, and somehow we'll get the originals back to you and make copies.
A That is a copy.
Q That is a copy?
A This is.
Q All of this is a copy. State's Exhibit Number 76, the remainder of the records within the special ed department of the Dallas Independent School District regarding LaRoyce Smith, fair?
A Yes.

MR. LUCAS: We offer Exhibit 76.

MR. MANASCO: No objection.

THE COURT: They'll be admitted.

(State's Exhibit Number 76 admitted into evidence.)

MR. LUCAS: That way, they'll have ample [47] time, Your Honor. I appreciate it.

Q (By Mr. Lucas) Ma'am, as far as—and I've got a bundle of papers also, but are you familiar with certain forms called Student Referral to Principal's Office, are you familiar with that?
A Yes, I'm familiar with those.
Q Does your file include any of those?
A No, sir. Those are school records and not eligibility records.

Q So regarding specific referrals to the principal or assistant principal or any other administrator within each individual school, you don't have those records, I take it.

A No, sir.

Q Are you even aware of incidents that took place -- specific incidents of misconduct?

A No, sir.

Q So, if someone told you LaRoyce Smith was a model student or, on the other extreme, rowdy as possible student, you don't know that?

A No, sir.

Q You're just dealing within your expertise, and that being special ed?

A That is correct.

MR. LUCAS: We thank you. We pass the witness, Your Honor.

[48] REDIRECT EXAMINATION

BY MR. MANASCO:

Q Ma'am, Mr. Lucas said he talked to you about 20 seconds. Has he called you out there at the school anytime from January 7th up to this time, ma'am?

A No, sir.

Q Have you heard from Mr. Nancarrow or Ms. McDaniel saying, "Well, gee, did he have any kind of problems in school?"

A No, sir, I have not.

Q Did any of their investigators in this capital murder case come out there like I did and go through the files, to your knowledge?

A Not to my knowledge.

Q Did the DeSoto Police Department come out there, say, "Well, ma'am, let's check him out and *see* if there's something wrong here or not"?

A Not to my knowledge.
Q What about the Dallas Police Department?
A No, sir.
Q So, in terms of the 20 seconds, if they had wanted to, if they had cared, then they can check just like I did; would that be a fair statement?
A With the proper authorization, yes, sir.
Q That being a subpoena, correct?
[49] A Yes, sir.
Q You all would have shown him just like you showed me?
A Yes, sir.

MR. MANASCO: Thank you, ma'am.

RECROSS-EXAMINATION

BY MR. LUCAS:

Q Ms. Pingle, now the jury has the entire files so they know everything that you would know about this case; is that correct?
A That is correct.

MR. LUCAS: Thank you, ma'am.

MR. MANASCO: Your Honor, I'll pass the witness. May this witness be excused?

THE COURT: Any objections?

MR. LUCAS: No objections.

THE COURT: You can return home or to your place of business.

* * *

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 74 (Goffney, Kristi)

MR. MANASCO: Your Honor, the defense would call Kristi Goffney.

KRISTI GOFFNEY, the witness hereinbefore named, having been previously cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO

Q Would you state your name, please?

[74] A Goffney, G-o-f-f-n-e-y.

Q Ms. Goffney, you testified before the jury, and it's obvious, you can date pretty much who you want to; is that right?

A Yes.

Q So, I take it that LaRoyce is what appears to be equal intelligence to you, you all are able to communicate, aren't you?

A Yes.

Q That's certainly above average in my opinion. Is that your opinion, also?

A Yes.

Q That's—he's able to communicate about what's going on in your life, your part of town, the city we all live in, whatever; is that correct?

A Yes.

Q I mean, you wouldn't date anyone that wasn't that way, would you, ma'am?

A No, I wouldn't.

MR. LUCAS: That's all we have. We pass the witness.

MR. MANASCO: No other questions.

THE COURT: You can step down.

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 78 (Goffney, Meg)

(Witness sworn.)

MEG GOFFNEY, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, ma'am?

A Meg Goffney.

Q Ms. Goffney, are you the mother of Kristi, the young lady that just got through testifying?

A Yes, I am.

Q I just got a couple of questions for you, ma'am. Obviously, it's a situation where Kristi and LaRoyce or Trody are engaged; is that correct?

A That's correct.

Q All right. Have you ever know Trody or LaRoyce to be violent toward your daughter?

A No, I haven't.

Q I mean, if he was hitting your daughter and knocking her on the side of the head, would you put up with that for one moment? [78] like he was the type of person that would be totally interested in anyone he felt was a friend, from his sister on down, whatever. He would give his all for whatever without thinking possibly sometimes.

Q. Okay. Sometimes giving his all to his friends might work to his detriment?

A It tends to do that lots of times. Yes, in this case.

MR. MANASCO: Thank you, ma'am. That's all I've got.

CROSS-EXAMINATION

BY MR. LUCAS:

Q Ms. Goffney, I guess, then, you would agree with your daughter that LaRoyce is above average intelligence?

A I would say he is a person who has an intelligence capable of understanding and learning, yes.

Q I don't know if that answers my question or not. You wouldn't want your daughter going with anyone, much less being engaged, to just anyone. So, does he appear to be average or above average intelligence, in your opinion?

A I would say he has average intelligence, yes, sir.

Q Okay. He's able to turn on the charm, isn't he towards you? Has he ever used any profanity towards you, ma'am?

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 88-91 (Wilson)

MR. MANASCO: The defense would call Myron Wilson.

(Witness sworn.)

MYRON WILSON, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, sir?
A Yes, my name is Myron Wilson.
Q Mr. Wilson, how old are you?
A Twenty-nine.
Q Where do you work?
A United Parcel Service.
[89] Q How long have you worked there?
A Ten and a half years.
Q Are you a married man or single?
A Single.
Q How do you know LaRoyce or Trody?
A He's my brother.
Q Even though you all are, what, about nine years age difference—
A It will be ten on August 28th, that's my birthday.
Q That's my birthday, too. Did you all grow up in the same household some, then?
A Yes, sir.
Q But you're considerably older than Trody? A Yes, sir.
Q All right. Let me ask you, Mr. Wilson, if you were aware of the situation going on in the family where Trody's daddy was using crack cocaine?
A Yes, I was.

Q Tell the jury about that, what you know.

Q Well, he was the type individual that he likes to go out and ride the motorcycles and stay out and hang out all night. My mom was the provider. She would try to go to work. I would let her use my cars some days to go to work, and I would stay there and watch Trody and my little sister, Veta. He wouldn't come home for two or three days. My mama just [90] kind of got fed up with it and she started to, you know, telling him, you know, that he had to leave, and he kind of got on cocaine and drug abuse. It was just a number of things that started kind of affecting the family.

Q When you say affecting, what do you mean by that, sir?

A Well, it kind of took it's toll on my brother and my sister.

Q Are you talking about Trody?

A Yes, sir.

Q Tell us about this toll it took on your brother and sister.

A Well, he just didn't appreciate how he was doing things, that when he would come home after two or three days when he would come to the house and how he would talk to my mom. He's just the type person, he just didn't want no individual to get abused, that's the type person he was.

Q Are you talking about Trody?

A Yes, sir.

Q Are you the man that your mama had to take stuff over to hide so that your daddy wouldn't sell it for crack?

A Yes, sir.

Q Do you remember anything in particular that your mama had to bring over so that she could keep it away from your daddy?

[91] A Well, she brought the V.C.R., the microwave, and that stuff that you buy from Tupperware or whatever, this place she used to sell stuff for.

Q That was so it wouldn't be sold away?

A Yeah, so it wouldn't be sold.

Q Now, the prosecutor might pooh-pooh all this, but it's a situation where you know it had an affect on your family?

A Yes, sir.

MR. MANASCO: I'll pass the witness.

MR. LUCAS: We have no questions of the brother, Your Honor.

THE COURT: Thank you, sir. You can step down.

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 91-93 (Ellis)

MR. MANASCO: I'll pass the witness.

MR. LUCAS: We have no questions of the brother, Your Honor.

THE COURT: Thank you, sir. You can step down.

MR. MANASCO: Your Honor, we call Dorothy Ellis.

DOROTHY FAYE ELLIS, the witness hereinbefore named, having been previously cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, ma'am?
[92] A My name is Dorothy Faye Ellis.
Q All right. Ms. Ellis, can you tell the jury how you know LaRoyce Smith?
A How I know him?
Q Yes, ma'am.
A Oh, I've been knowing LaRoyce before his mother was pregnant with him, and then when she had him, he's just like a child of mine.
Q Was LaRoyce the kind of child that was a mean and cruel to animals and would torture them and things like that when he was growing up?
A No.
Q What kind of a child was LaRoyce?
A Liked to play.
Q Like most kids?
A Loved to play, loved to eat.
Q Well, okay. Did you know the family during the period of time where Johnnie Mae, his mama, was having problems with his daddy?

A Yes.

Q Could you tell the jury whether or not that had any influence on the family or was it just something like no big deal?

A Oh, it affected him, it affected him real bad.

Q Well, tell us about that.

[93] A Well, because his dad would sell all the stuff and his mama had to be the mama and the daddy, you know, go to work. Things we used to go out to eat and do, well, you know, she had to pay the bill if we go out to eat like we used to do.

Q Have you ever seen LaRoyce around children, ma'am?

A Yes.

Q Tell us about that.

A Well, Christmas Day we was all over my grandchildren —I have six grandchildren—he over there, playing with them, giving them pecans, showing us what he got for Christmas, playing with them. He played—I got a year and a half old grandbaby, and he just played with that baby.

Q Is it a situation where he appeared to definitely enjoy being around children?

A Yes.

Q Is this something that he's just turning on the charm because he thinks this baby might be of some benefit to him in the future?

A No, he just liked to play. He like to play with all my children, even my grown children, he play with them.

Q Is LaRoyce some kind of an evil monster that the only way we can take care of him is to kill him, ma'am?

A No. No, he don't need to be killed.

MR. MANASCO: Thank you, ma'am. I'll pass

Punishment Phase Jury Instructions
[from Transcript Vol. I, 112-119]

IN THE 265TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS
JANUARY TERM, 1991

No. F91-22803-TR

THE STATE OF TEXAS,

VS.

LAROYCE LATHAIR SMITH.

MEMBERS OF THE JURY:

By the verdict you have returned in this case, you have found the Defendant, LaRoyce Lathair Smith, guilty of the offense of capital murder, as charged in the indictment. It is now necessary for you to determine from all the evidence in this case the answers to certain questions called "Special Issues" in this charge.

Our law provides that the punishment for the offense of capital murder in this state is death or by confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

You are instructed that you may consider all the evidence submitted to you in the full trial of this case; that is, all the evidence submitted before you in the trial of the first part of this case where you were called on to decide the guilt or innocence of the Defendant, and in the second part of the trial where you are called on to answer Special Issues. As in the first part of this trial, it is up to the jury to determine the

weight and credibility of the evidence, if any, and its bearing, if any, to the Special Issues being considered by the jury.

You are further instructed that in answering the Special Issues in this charge relating to punishment, you must not consider the instructions given you in the guilt/innocence phase of the trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. In this punishment phase of trial, you shall consider only the conduct of LaRoyce Lathair Smith, the Defendant, and no other, in determining what his punishment shall be.

The burden of proof is on the State to prove each Special Issue submitted to you beyond a reasonable doubt. If the State does not prove an issue beyond a reasonable doubt, or if you have a reasonable doubt about any issue, then you shall answer that Special Issue "No."

You are instructed that you may not answer a Special Issue "Yes" unless the jury unanimously concurs, and in such event, the verdict form for such Special Issue shall be signed by the foreman. You may not answer a Special Issue "No" unless 10 or more jurors concur, and in such event, the foreman shall sign the verdict form.

You are further instructed that if any juror, after due deliberation and considering all the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue.

You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or

may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

If the jury returns an affirmative finding on each of the Special Issues submitted, the Court shall sentence the Defendant to death. If the jury returns a negative finding on any of the Special Issues submitted, the Court shall sentence the Defendant to confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

You are instructed that certain evidence has been admitted before you of criminal conduct and/or bad acts committed by the Defendant other than the offense for which he is on trial. In that regard, you are instructed that you may not consider such evidence for any purpose unless you first find and believe from the evidence beyond a reasonable doubt that the Defendant committed said criminal conduct or bad acts. If you do not so find or believe from the evidence, you must wholly disregard such evidence. You may consider any defenses the Defendant might have to any offenses.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a right accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the Defendant has elected not to testify in this phase of the case, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the Defendant.

The general purposes of the Penal Code of the State of Texas are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:

(1) To insure the public safety through:

(a) the deterrent influence of the penalties hereinafter provided;

(b) the rehabilitation of those convicted of violations of this code; and

(c) such punishment as may be necessary to prevent likely recurrence of criminal behavior;

(2) By definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;

(3) To prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;

(4) To safeguard conduct that is without guilt from condemnation as criminal;

(5) To guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses; and

(6) To define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

[illegible]

influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. The Court has no right by any word or any act to indicate any opinion respecting any matter of fact involved in this case, nor to indicate any desire respecting its outcome. The Court has not intended to express any opinion upon any matter of fact in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

You are further instructed that your verdict shall be arrived at by due deliberation and not by drawing lots or by any other method of chance.

You are further instructed that in determining the punishment in this case, you are not to discuss among yourselves how long the Defendant will be required to serve any sentence you decide to impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

/s/ Keith Dean
KEITH DEAN, Judge
Dallas County, Texas

State's Closing at Punishment
Excerpts: Vol XXXIII: 20, 24-25, 27, 32, 84

CLOSING ARGUMENT

BY MS. MCDANIEL:

Members of the jury, it's been a while since Mr. Nancarrow and I spoke with you, and you know that when we talked to you—and let me, first of all, tell you that I thank you for your time and attention in this trial.

Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, "Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes." If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

Now, let's talk about these special issues. Let's talk about special issue number one. Was the conduct of the defendant in causing the death of Jennifer Soto done deliberately and with the reasonable expectation of the death of Jennifer So to would occur—would result? Is there anybody here who would seriously contend that he did not do this deliberately? Well, let's look at it, let's talk about it.

Let's talk about not only what caused her death, but also the surrounding facts, the facts that show what happened before, and what happened, and what happened after. Planned? Well, you know from the testimony of the witnesses that he had worked at the Taco Bell before. He knew Jennifer

[24] I tell you? He comes back to the car after he's pistol whipped her, shot her with a gun, stabbed her with a knife

multiple times, he comes back to the car holding that knife—what does little Dweilon tell you? I think his words were, "Well, he was like calm when he said, 'She knew me. I had to cut her throat. She knew me.' He was like calm."

Now, this is deliberate. It's not accident. It's not mistake. It is intentional and deliberate, and you all told us that when you saw that, what that meaning of the word "deliberate" meant, that you would know it.

You know, we couldn't get into the facts of this case on voir dire, but if we could have, we couldn't have given you a better example of what deliberate is. This is it. I'm going to ask that you answer that question number one yes because the evidence demands that you answer it yes, not only intentional, but deliberate. Wasn't enough to shoot her once, wasn't enough to pistol whip her. No, had to proceed and do this to her. Turned her into a bloody corpse.

Question number two: Is there a probability that the defendant will commit criminal acts of violence in the future that will constitute a continuing threat to society? When we talked to you on voir dire about this question, you saw the distinction between—in the word "probability", you told us that you wouldn't require us to prove it to you to a certainty, that you understood the word "probability", and [25] that it had a certain meaning, and that you would not require us to prove that he would go out and commit another murder or another criminal act of violence, but there's a probability that he would. You also—and every one of you told us when we asked you could you find the answer to that question number two yes just based on one act alone. In other words, could you find the answer to be yes, could you learn enough about an individual, enough information, to say, yes, he will—there's a probability that he will commit criminal acts of violence in the future that would constitute a continuing threat to society.

Well, I submit to you that—let's talk about this act. Let's talk about the before, the during, and the after. Well, you know, and we've talked about how he planned it, he prepared it, he talked about it. "You going to do this for me, Kevin? We're going to hit the Taco Bell." You know that he got—provided the weapon, the gun. That was his doing. You know that they had an opportunity not to commit the offense, and they didn't. He had the alternative to turn around, "Hey, let's go on home. We don't need any part of this." But, no, because of this man, Jennifer Soto is dead. "Got to do it. We've got to do it." You know that he said on the way there, Dweion told you, "If she sees my face, I'll have to kill her." Premeditated? Knew what he was going to do when he went in there? Yeah, he didn't do anything to

[27] follow them into an apartment complex. He was so upset about what he had done that he ran. You know that although his—everybody who wasn't apprehended that night turned themselves in the next day, but not LaRoyce Smith, no. Instead he—after the offense when he goes over to his friend David Shawn Harrison's house, and what does he tell David? "Well, we robbed a Grandy's in DeSoto and we got $5,000 and we had to kill a girl. We had to shoot a girl." Did he show any re-morse about that? No. He's more interested in getting rid of this bloody jacket, give that to David Harrison. Gets rid of that.

We know that the next day he was just going about his business and goes over to his girlfriend's house and hides the jacket underneath the bed. Had to raise the bedskirt, and there it was, blood on the jacket. You know that that night—well, we didn't hear anything from his mother about how he was so upset when he came in that night, the same day this happened. No, they just went about washing the clothes—washing his clothes. It was washing time. You know, he was really upset about this.

You said you could answer that question number two yes just based on one act alone. Well, we brought you more than that. What did you hear about this man? You heard that he was—he had an aggravated assault case and we brought you the evidence on that case.

[32] to January 22, 1991; boom, January 7, 1991, he has elevated his conduct to the ultimate serious offense of the laws of this state, capital murder. If we had only known what we know now about him. If Jennifer Soto had only known about him what we know now about LaRoyce Smith, maybe she could have protected herself, maybe we could have protected her from him, but we do know now what we know. They can't wish it away or wash it away because it's here and you heard about it.

Members of the jury, the defendant, by his own conduct, has dictated the answer to question number two. By his own

CLOSING ARGUMENT

BY MR. LUCAS:

Ladies and gentlemen, we've reached that phase in the trial—and you'll be glad to know that I'm probably going to be the last person to talk to you. There are no more witnesses. There are no more arguments. I'm allowed somewhere around 30 minutes to just share my views with you, answer a few of the things that Mr. Manasco said that I feel are important and relevant, just let you know a little bit how I feel about the facts of the case.

Mr. Manasco has managed to call every witness that hurts them a liar. That goes from every one of the kids that was in the automobile to the school teachers. I mean, they have some type of vendetta against LaRoyce Smith. Everyone

. . . .

[84] shows that this man is a sadistic, brutal killer. He can turn it on, he can turn it off. He can be so lovely around his kinfolks, no problem there, but when he gets out on the street, he is LaRoyce Smith. What did he say one year—one year on the probation, "One year is not going to hold back Big T, big trouble." Remember that? He said that at the elevator that Chris Standmier heard. Chris Standmier's mother comes over to talk to his mother just as adults, Trody rolls through the room and says, "I don't know what she's talking about. She's crazy." Accept responsibility? Absolutely not. Pass it on to some other people? Absolutely, that's what he's going to do.

Ladies and gentlemen, I'm going to be sitting down in just a few moments. The case is going to be in your hands. When we talked to you on jury selection, we talked to you -we told you at that time what we felt the facts were going to call for, that this was an individual where the ultimate punishment is earned by him over the years. The brutality of this particular case standing alone, if you absolutely knew nothing else about LaRoyce Smith and his background, the brutality alone calls for the death penalty in this case. So, please, this is the time to have compassion, not for this individual, not for this outlaw, but for the victim and the victim's family. We'd ask you to consider that.

Thank you, Your Honor.

Defense Closing at Punishment
Excerpts: Vol. XXXIII: 43-45; 55-58; 69

CLOSING ARGUMENT

BY MR. MANASCO:

Members of the jury, I told you all on voir dire that if you would listen to the evidence, you paid attention and applied the facts to the evidence, then I wouldn't have any quarrel with you regardless of what your verdict would be. I know by the time that you've spent deliberating, I know by the questions that you sent out that you did that, and I will stand by my word. You have an awesome responsibility, because you've literally got someone's life in your hands. I have an awesome responsibility, because if I have forgotten something, then this man may die. It's not a T.V. show. It's not a game. I think it is important that you consider the role that LaRoyce Smith had.

Now, Ms. McDaniel makes it all cut and dry. I think we are in an unfortunate position that we don't know what you were thinking. We don't know, because of the way the charge is so constructed, that you believe that LaRoyce is the one who cut and stabbed and shot, and that all this about Kevin Shaw I've been talking about is just so much smoke.

. . . .

[43] shoes?" Who had killing on their mind from the beginning to the end? At the Shamrock station, "I could have robbed that whore." Who has killing on their mind at the end? "Sure hope I don't have to kill no fucking hero, too." Who has killing on their mind inside the Taco Bell? They don't know. Even their own witness says—Dweilon, I think his name is—"We should all be in the same boat, to be fair." To be fair. Limited dis-cretion? You know, put everyone in the boat, you don't need a single needle to execute. You need

them all lined up and have some kind of electric sofa, is what it would take in this case.

There's two special issues. I want to talk about both of them. The first is deliberate. Was it done deliberately? The expectation that she would die. In voir dire, you all told us that you understood it meant something more than intentional, otherwise, there would be no point to the question. Some of you said you were looking for premeditation; they're going to do it no matter what, going to kill before they ever went in.

Now, the prosecutor, Ms. McDaniel, talks about that "Well, if she sees my face, I'm going to kill her." Now, we took care of that in the guilt/innocence. Remember when I brought it up, I said, "Now, that sounds bad, but, sir, look at your statement. At least in terms of she, didn't you use the word 'they?'" There was no evidence he knew she was [44] working there. He said, "Yeah," and that is from the one person that did not even know—that swore to you Kevin did not even go in the place until after the shooting. Nancarrow tells you, "They're all hedging." He tells you that. "They are all lying to you." Even their own witness, I believe it's two of them, said, "No, LaRoyce did not say he was going to kill anyone. He talked about, 'Well, if there's some trouble, we might bribe them.'" There's talk about a freezer. Reasonable doubt? Yes.

You know that Nickles Lewis told the truth when he said, "I figure Kevin blew it." It was never intended to be a murder. Premeditation of robbery? No question. No question to anyone that's heard one day of this case would know that. Premeditation for murder? The actions were not deliberate, they were chaotic. They stay out there 45 minutes to an hour trying to decide how to get in. Is that the cold, calculating plan that Ms. McDaniel tells you about? They get in the car, leave and start to come back. Is that someone who just—it's so set in concrete? If it was so planned and if LaRoyce is such

a bad guy with that Uzi-like gun, why didn't he have the Uzi? If those were his bullets instead of Nick's, like Nick has pled to the gun charge across the hall, why didn't he have the .38? If it was so planned, so deliberate, why did they have to risk going to see if someone else was there and that would give them a gun?

[45] Deliberately causing death. It's not pretty, but I want you all to take a look at that autopsy report that's been admitted. It says the stab wound to the head, it's one-half inch deep; the stab wound to the chest, three inches deep; the leg is the deepest one, five and a quarter. He says that's the fatty part of a person's body, four inches of fat. The neck, even the fatal—if the gunshot didn't do it—the fatal stroke, three inches deep. You all have seen that knife. You take it back to that room. Deliberate? If he wanted to make sure she was dead, that would have been stuck through her to the hilt. You're not going to have any three inches. That could go through her almost a foot.

The gunshot, even Travis Brown says, "I didn't even think she had been shot." Certainly at the time, it did not appear that that was a fatal wound. It's not to reward anyone. You're not supposed to give brownie points to LaRoyce or Kevin, or whoever killed that girl, because he didn't stick it in her as far as he could, but there's scientific evidence showing the death. You know that if a person wanted to be sure, they would be sure. That knife wound would have punctured every major organ in that poor girl's body.

Question two. Continuing acts of violence. Is he a continuing threat to society? On voir dire, almost all of you told us that you were looking for someone who had a long criminal record, that's in and out of the penitentiary,

. . . .

[55] record of about six months. You have every police officer that has testified badly saying, "He didn't give me any

problems." He doesn't have a problem with law enforcement on the street, in the jail, and it's a reasonable deduction from the evidence he sure won't in the penitentiary. Mr. Lucas will say, "Well, there's no guarantee. We can't even guarantee what our kids are doing the next day, much less what someone else will do." That's true, but that is not the standard that you're at. What the question is, is whether or not there is a reasonable doubt that he will not be a continuing threat to society. The society you're going to place him in is the penitentiary. You have a reasonable doubt. You have a track record.

Remember, we even told you that LaRoyce—at the time of the trial, during the voir dire, not when these fine bailiffs were here, but other bailiffs, he was all by himself. He could have got up and ran away, probably would have been caught, I guess, but even when there's not anyone around, there is no authority problems with the law enforcement.

I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you and [56] that the State has a burden—that if you think that he should not die, you are to put "no" in one of the spaces, that the State has the burden of proof beyond a reasonable doubt to convince each and every one of you that he should still die.

Now, mitigating evidence comes to you from the witnesses. Now, the State wants to think about things in terms of black and white, you know. If you're a burglar, well, you're a burglar then and you're a burglar now and you'll always be a burglar. They're not interested in finding out about LaRoyce Smith. Example: Special education. What does Lucas say? "Well, ma'am, I talked to you about 20 seconds out there." I said, "Ma'am, in the six months that he's been preparing this

case, he could have gone out there just like I did. Did any of those lawyers go out there?" "No." "Any of the investigators?" "No." They don't want to know.

What about the neighbor, Mr. Miles, the next door neighbor. "Mr. Miles, has the State ever contacted you?" "No." The man that lives next door to him, they did not even talk to. They don't even want to find out from the next door neighbor about the man they want to kill. They do not want to think that there's something else, that there's nuances or shades of gray. You know that every dirty piece of rock they can find, piece of material on his life, they can bring up to [57] you. There's no juvenile record, never spent a day in the penitentiary. You don't know about rehabilitation. No guarantee? That's right. But you know up to now every time he's been incarcerated, he's not given them one, not even so much as sneeze on an officer or, you know, he would have been up there in a New York minute.

I want to talk to you about mitigating evidence. First of all, about special education. Now, from 1978, there's evidence—now, it's not like he had been plotting and planning since 1978 that maybe one day he'll do something and that it will be good to have this stuff. That's the way he is. The evidence we have, medical diagnosis, slow learner, may be organic. Objective test data, I.Q. 78. He is eight points from being mentally retarded. Why do you think LaRoyce gets along so well with kids? Because he's like one, that's why. Because he's like one. He certainly didn't go to El Centro like Kevin Shaw, now, did he? It shows he is not a leader, it shows he's a follower, just like the school did way back then. "Get your boy to chill out."

Look at the record, then, in '86, still having problems, mark through promote. You all heard of social promotion. It's probably a football promotion, too. Family problems. Lucas will say, "Well, we've all had problems and many of us have been raised by single parents." That's true, but how many of

us have had our daddies sell our appliances [58] for crack, that we've had to take and hide our V.C.R.'s, our T.V.'s, our freezers, so our own daddy wouldn't go and sell it for crack? You know that that has an impact on someone. It has an impact on how they act in school. Now, Lucas will say, "Well, you blame school, you blame the parents. We're doing the best we can." We're not blaming the school, and we're not blaming the parents. We're telling you that it's something that happened and it's something that you should consider because it's not black and white.

I want to talk to you about character traits, what LaRoyce is really like. Now, Lucas will tell you, "Well, all this, I would hope, we can bring our family and friends if we get in trouble." We probably would hope that. You know what the truth of the matter is? You know how hard it is to get someone to come down to the courthouse from across town, much less flying from Oklahoma City. These people voluntarily came down. They took off from work. They rearranged their schedules. They came in from out of town because they had something to tell you that the State does not know. Who are the people that know you? I would hope it would come as no surprise that most of the people that you know are either your family or your friends. If you're old enough to have a track record, your people in your career. That's interesting. Interesting.

Work. You know LaRoyce has had a number of jobs.

. . . .

[69] not one disciplinary action. You know there's a reasonable doubt. There's a place for him all right, it's not out on the streets of Dallas, it's in the, penitentiary, but it's not strapped to that gurney.

The State of Texas must prove to you beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence. You shall answer no to one of the issues

to give effect to your meaning. LaRoyce's life is in your hands, no question about that. There's a lot more than that. The State doesn't care about his life, didn't investigate, doesn't mean anything. These people didn't get up here because they didn't have anything to do and wanted to have a quick thrill in the courtroom. They testified and came down here because they wanted to tell you there is something worth saving. Aids Fred Cox. A monster? Tells the sister, "Don't do what I did." Helps his neighbors without asking for money. He's not turning on the charm. That's LaRoyce.

You know, a long time ago when this Constitution—when everything was being built trying to set up this country, they tried to decide powers, who was going to do what. It was said that when they got to war powers, they had a big discussion. They tried to say, "Well, you know, maybe we shouldn't have all these generals deciding who should go to war." The phrase that was used is, "Maybe war is too important for warriors." Sure enough, they gave the power to

Jury Verdict Form
[from Transcript Vol. I, 120]

IN THE 265TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS
JANUARY TERM, 1991

NO. F91-22803-TR

THE STATE OF TEXAS,

VS.

LAROYCE LATHAIR SMITH.

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict, you will answer "Yes" or "No."

ANSWER: Yes

/s/ [Illegible]
FOREMAN

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict, you will answer "Yes" or "No."

ANSWER: YES

/s/ [Illegible]
FOREMAN

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	

Appellant's Brief on Direct Appeal
Excerpt: POE 5-6, pp. 23-31

IN THE
COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

[Filed APR 20, 1992]

Cause No. 71,333

LAROYCE LATHAIR SMITH,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

On appeal from the judgment of conviction rendered in Cause Number F91-22803-R in the 265th Judicial District Court of Dallas County, Texas.

BRIEF FOR THE APPELLANT

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* * * *

APPELLANT'S POINT OF ERROR NO. FIVE

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NO. TWO.

The jury answered the second special issue in the affirmative. Appellant maintains that the evidence is insufficient to support this finding.

The State must prove each punishment issue submitted beyond a reasonable doubt. TEX. CODE CRIM. PROC. Art. 37.071 (c) (repealed); *O'Bryan v. State*, 591 S.W.2d 464, 479 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 988 (1980).

The standard of review is whether, viewing the evidence in the light most favorable to the verdict, such evidence would persuade any rational trier of fact to answer the issue in the affirmative. *Stoker v. State*, 788 S.W.2d 1 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 371 (1990); *Burns v. State*, 761 S.W.2d 353 (Tex. Crim. App. 1988) and *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987). A review of the entire record is necessary because the jury is entitled to consider the evidence presented at the guilt innocence phase as well as the punishment phase when answering the issues. *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991); *Huffman v. State*, 746 S.W.2d 212, 223 (Tex. Crim. App. 1988); *Beltran v. State*, 728 S.W.2d 382 (Tex. Crim. App. 1987); and *Livingston v. State*, 739 S.W.2d 311 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1210 (1988).

Among the factors a jury may consider when answering the second issue are:

1. The circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;

2. The calculated nature of the defendant's acts;

3. The forethought and deliberateness exhibited by the crime's execution;

4. The existence of a prior criminal record, and the severity of the prior crimes;

5. The defendant's age and personal circumstances at the time of the offense;

6. Whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

7. Psychiatric evidence; and

8. Character evidence.

Keeton, 724 S.W.2d at 61. Additionally, the circumstances of the offense alone may be sufficient to support the jury's affirmative answer to the second issue. *Alexander v. State*, 740 S.W.2d 749, 761 (Tex. Crim. App. 1987).

A. The Facts of the Offense:

Appellant submits that the facts and circumstances of the offense are not alone sufficient to support the verdict on the second special issue. Viewing the evidence in the light most favorable to the verdict, Appellant and several companions went to the Taco Bell at the very least with robbery in mind. Appellant stated that he might have to kill the decedent, whom he knew, if she could identify him; however, he also opined that her silence could be bought with a share of the proceeds of the robbery. According to Travis Brown, Appellant shot and stabbed the decedent after learning she could not open the safe.

It is true that this was a senseless murder, but this fact is true of every murder in the course of a robbery. The facts of this offense, standing alone, do not carry the marks of a calculated and cold-blooded crime, such as in *O'Bryan*, 591 S.W.2d at 480, where the defendant for months planned the candy poisoning of his own child to collect life insurance

proceeds. To hold that the facts of this offense, standing alone, would sustain an affirmative answer to special issue no. two, would mean that virtually every murder in the course of a robbery would warrant the death penalty. Such a construction would destroy the purpose of the punishment stage in capital cases, which is to provide a reasonable and controlled decision on whether the death penalty should be imposed, and to guard against its capricious and arbitrary imposition. See *Roney v. State*, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982).

B. The Keeton Factors:

With respect to the first three *Keeton* factors, Appellant was working with several other parties. There was some forethought and deliberation attached to the offense. The record reflects that Appellant discussed the robbery and possible violence if he were recognized. According to Travis Brown, Appellant shot the decedent and then went looking for another weapon, a knife. Nevertheless, there was not an extensive degree of planning and forethought concerning the murder of the decedent.

The prior criminal record offered by the State is not indicative of future dangerousness. Appellant pleaded guilty to a misdemeanor assault on Christopher Standmier. The facts and circumstances of the offense do indicate some degree of violence; however, the incident appeared to have been generated by a quarrel over a girlfriend with animosity on both sides. This was not a random or unprovoked act of violence. Moreover, the fact remains that the State was willing to accept this as a misdemeanor offense.[3]

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[3] The State made much of the fact that the complainant agreed to a reduction in the offense because he was tired of leaving school to come to court. Nonetheless, the State at the time did not consider Appellant's conduct—which did not cause serious bodily injury—sufficiently serious to override the complainant's feelings and proceed with the felony prosecution.

Evidence was educed of Appellant's possession of cocaine. The State made some effort to show that his possession of what turned out to be 1/15 of a gram of cocaine was possession with intent to deliver; however, no violence attended this offense and the crime itself is not indicative of future dangerousness.

Appellant had no other criminal record. The State attempted to show that evidence of Appellant's future dangerousness could be found in his conduct at school. At the very least, this evidence was equivocal. One teacher testified that Appellant had threatened at least to "whip" him; he could not say with certainty that Appellant had threatened to kill him. Another teacher testified that Appellant had threatened to kill him; however, he did not inform authorities and no record of this alleged threat appeared in Appellant's school records. At all events, there is no evidence that Appellant ever attempted to carry out any of these alleged threats or actually committed any bodily harm to school officials.

The State produced evidence that Appellant had been referred for suspension and had a bad reputation for following school rules. Such evidence, however, falls short of proof of future dangerousness. Moreover, Appellant produced other school district employees and supervisors to show that he was not a violent troublemaker.

Finally, the State sought to prove that Appellant had possessed an automatic weapon or other weapon at school. While the evidence showed that Appellant's lockermate, Nickles Lewis, possessed a Tech 9 pistol, the State was unable to link this weapon to Appellant. Appellant was found in possession of .38 bullets and told a youth officer that they hadn't found his gun; however, the State never proved that Appellant had indeed possessed a weapon in school.

Appellant was nineteen years old at the time of the offense. He produced evidence that he was close to being mentally

retarded and at the very least had a history of learning disabilities. His evidence showed a history of family strain caused by his father, who sold the family's personal property to buy cocaine.

A minister testified that Appellant appeared sincerely remorseful over the circumstances of the decedent's death. This was corroborated by Appellant's testimony at the guilt stage where he told of his desire to write a letter to the decedent's family, an action his counsel did not feel was appropriate at the time. There was no evidence that Appellant had been boastful of his conduct or had created any problems while in confinement.

Concededly, the evidence fails to show that Appellant was under duress or the domination of another person. Of course, Appellant testified that the killing was the independent impulse of Kevin Shaw; however, it appears that the jury by its verdict rejected Appellant's version of the offense.

No psychiatric evidence was educed by the State to the effect that Appellant would constitute a future danger to society. Although such evidence is not essential, *Beltran v. State*, 728 S.W.2d at 390, the fact remains that there was no expert testimony before the jury indicating that Appellant would commit criminal acts of violence which would constitute a continuing threat to society.

The State did introduce some evidence that Appellant had a bad reputation for complying with school rules and had a bad reputation for being a rule-abiding person in school. The State did not, however, introduce any testimony that Appellant had a bad reputation in his community for being a peaceful and law-abiding person.

By contrast, Appellant presented several good character witnesses. Reverend Samuel Nicks testified that Appellant could be rehabilitated and constituted no future danger to society. Fred Cox testified that Appellant came to his aid

during an altercation where Cox had been set upon by boys from a rival school. Kristi Goffney, Appellant's fiancee, testified that Appellant had agreed to marry her after learning she was pregnant by him and he had been looking for work to support them. She further testified that she had never known Appellant to be violent.

Meg Goffney, Kristi's mother, testified that Appellant had never been violent to Kristi. She also related that Appellant had been a father figure to his sister, Veta, who had been giving the family some problems.

Robbie Johnson, a friend of Appellant testified that he had never known Appellant to be violent. Dorothy Ellis, a friend of the family who had known Appellant since birth, stated that he loved playing with children and "was not a monster who needed to be killed." (R. XXXII 93).

Charlotte Thompson testified that she tutored Appellant in school. She felt that Appellant was a salvageable person and had never known him to be violent. Appellant was supposed to be the best man at her wedding.

Tracy Reed, a legal assistant, testified that Appellant was a very helpful and giving person. She had Appellant babysit for her son. Ms. Reed testified that Appellant, if given a life sentence, would not constitute a threat to society.

James Miles, age 69, testified that he was Appellant's neighbor and Appellant had helped him many times. LaTonya Kerlin, who had dated Appellant's older brother, testified that when she was out of work, Appellant invited her to live with his family. She had not known Appellant to be violent with her children. According to the witness, Appellant had worked hard to support the family when his father had ceased supporting the family and stole family property to pay for his cocaine habit.

Gertha Williams was the mother of Adondra Williams, the subject of the dispute between Appellant and Christopher Standmier. Mrs. Williams testified that her daughter was the instigator of the trouble between Appellant and Standmier. She stated that Appellant had been thoughtful to her and was never violent toward her daughter. Mrs. Williams' husband, Benny Williams, testified that Appellant had been respectful of him and had never been violent toward his daughter.

Appellant's extensive character evidence, which essentially went unrebutted by the State, established that Appellant did not have a violent character and that the offense had been an aberration.

The State's evidence is support of special issue no. two is essentially the facts of the offense plus a confrontation and fight with another boy roughly his age. There was no extensive past violent conduct indicative of future violent tendencies. There was no psychiatric evidence or other testimony 'truly showing a bad reputation for obeying the law. Given the extensive character and mitigating evidence, it simply cannot be said that the State proved the second special issue beyond a reasonable doubt. Accordingly, Appellant prays that this point of error be sustained and the judgment be reformed to life imprisonment.

APPELLANT'S POINT OF ERROR NO. SIX

TEX. CODE CRIM. PROC. ART. 37.071 (REPEALED) IS UNCONSTITUTIONAL IN THAT IT PROVIDES NO EFFECTIVE VEHICLE FOR A JURY TO APPLY MITIGATING EVIDENCE

Prior to trial, Appellant filed a motion to have the trial court declare former Article 37.071 unconstitutional in that it provided no effective vehicle for a jury to apply mitigating evidence. The trial court denied this motion. (R.I 78).

The United States Supreme Court has held that the Constitution limits a State's ability to narrow a sentencer's

discretion to consider relevant evidence that might cause it to decline to impose the death sentence. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987). *See also Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821 (1987).

In *Lockett v. Ohio*, 438 U.S. 536, 98 S.Ct. 2954 (1978), a plurality of the Supreme Court reversed the death sentence of the defendant. Under the state statute governing imposition of the death penalty, the trial judge was to impose the death sentence unless one of three statutorily defined mitigating circumstances was found to exist. Other, non-statutory mitigating factors could be considered in determining whether the statutory factors existed, they could not be used separately to justify imposition of a sentence less than death. The Supreme Court held that this limitation of the range of mitigating circumstances was incompatible with the requirements of the Eighth Amendment.

In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982), a majority of the Supreme Court adopted the holding in *Lockett*. There the Supreme Court also vacated a death sentence for failure of the court to consider a mitigating factor within the confines of the state death penalty statute.

Similarly, in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986), the Court reversed a death sentence for failure of the trial court to admit certain mitigating evidence.

Finally, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), the Supreme Court held that there was an Eighth Amemdment violation where there was mitigating evidence not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, and the jury instructions would have provided the jury with no vehicle for expressing its reasoned moral response to that evidence.

Unfortunately, this Court has recently held in several cases that the second special issue of Article 37.071 provides an

adequate vehicle by which a jury can give effect to mitigating evidence of a defendant's background and character. The only evidence requiring a special issue appears to be evidence of mental retardation or voluntary intoxication. *See Lackey v. State*, 816 S.W.2d 392 (Tex. Crim. App. 1991); *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991).

In these cases, by limiting the holding of *Penry* essentially to its particular facts, this Court has effectively narrowed the sentencer's discretion to consider relevant evidence that might cause it to decline to impose a death sentence. As Judge Clinton noted in his dissent in *Lackey*:

> But if *Penry* stands for anything, it is that Art. 37.071, by itself, is a constitutionally unreliable mechanism for determining that death is an appropriate penalty whenever evidence is proffered having mitigating potential that transcends its logical relevance to the special issues. That in its current form the statute fails to function adequately as a conduit for much of what the Supreme Court has identified as mitigating evidence, thus rendering it unconstitutional in application in many cases under *Lockett* and its progeny, including *Penry*, necessarily means it has only a limited utility. There is no escaping that.

Lackey, 816 S.W.2d at 404.

By its extremely narrow interpretation of the requirements of *Penry*, this Court has unconstitutionally narrowed the sentencer's discretion to consider relevant mitigating evidence with regard to imposition of the death penalty. The special issues of Article 37.071 do not in reality provide a vehicle for individualized consideration of the appropriateness of assessment of the death penalty and said article is unconstitutional as applied. Appellant urges that this Court reconsider its recent precedents and hold that former Article 37.071 is unconstitutional as applied.

Smith v. State, No. 71,333
(Tex. Crim. App. June 22, 1994) (unpub)

APPEAL FROM DALLAS COUNTY

No. 71,333

LAROYCE LATHAIR SMITH,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

OPINION

Appellant, Laroyce Lathair Smith, was convicted of capital murder. V.T.C.A., Penal Code, Section 19.03. At the punishment phase of appellant's trial, the jury affirmatively answered the special issues set forth in Article 37.071(b), V.A.C.C.P. The trial judge then sentenced appellant to death as required by Article 37.071(e), V.A.C.C.P. Direct appeal to this Court was then automatic. Article 37.071(h), V.A.C.C.P. We will affirm appellant's conviction and sentence of death.

Appellant raises eight points of error, including a challenge to the sufficiency of the evidence at the punishment phase of the trial.

Around 11:30 p.m. on January 7, 1991, the victim was working as the shift manager at a Taco Bell in Dallas County. She was responsible for closing and cleaning the store and completing the appropriate paperwork. A co-employee, Travis Brown, was waiting inside the restaurant for the victim to finish her duties so that she could give him a ride home. Brown testified that appellant arrived at the restaurant by automobile with several other youths. Appellant and two

others then got out of the car and knocked on the door, claiming to need to use the telephone. Brown would not let the three enter the establishment because it was closed. He did, however, go to the back of the store and get the victim. The victim recognized the appellant as an ex-employee and allowed him to enter. Appellant then let his two colleagues into the restaurant.

Brown testified at trial that the victim then returned to the back of the store to finish some paperwork while appellant used the phone. After he hung up the phone, appellant came to the front of the restaurant and told Brown to leave because they were going to rob the Taco Bell. However, Brown professed that he could not leave. Appellant then went to the back office where the victim was working. Shortly after that, Brown heard some "yelling" and went to check it out. He found appellant "pistol-whipping" the victim while he had her in a headlock. After Brown attempted to get appellant to stop the attack, appellant stepped back and fired a shot at the victim.[1] Appellant then walked into the kitchen, grabbed a butcher knife, and returned to the office where he stabbed the victim three or four times. After this, all three perpetrators left the restaurant. Just before exiting, appellant told Brown that he would kill him if he talked to the police. However, after appellant left, Brown called the police.

Appellant alleges in his fifth point of error that the evidence is insufficient to support the jury's affirmative answer to the second special issue on future dangerousness. Article 37.071(b)(2), V.A.C.C.P. In reviewing whether the evidence is sufficient to support the jury's affirmative finding on the issue of future dangerousness, this Court must look at the evidence in the light most favorable to the verdict to

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[1] Brown clarified that he didn't think that appellant *shot* the victim, just that he shot at her. However, the medical examiner's testimony revealed that the victim was shot once in the back.

determine whether any rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society. Jackson v. Virginia, 443 U.S. 307, 97 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Allridge v. State*, 850 S.W.2d 471 (Tex.Cr.App. 1991) (opinion on rehearing), *cert. denied*, U.S., 114 S.Ct. 101 (1993). This Court has set out a number of factors that may be considered in making this determination,[2] although the facts of the crime alone can be sufficient to support an affirmative finding to the special issue. *Allridge*, *supra*. In fact, the circumstances of the crime may provide greater probative evidence of a defendant's probability for committing future acts of violence than any other factor relevant to the second special issue. *Id.*

Looking at the evidence in the light most favorable to the verdict, we find the circumstances of the offense to be rather cruel. Appellant knew the victim and even hugged her when

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[2] See *Vuong v. State*, 830 S.W.2d 929 (Tex.Cr.App. 1992), *cert. denied*, U.S., 113 S.Ct. 595 (1992); *Keeton v. State*, 724 S.W.2d 58 (Tex. Cr.App. 1987) ("*Keeton I*"). These factors include, but are not limited to:

1. the circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;
2. the calculated nature of the defendant's acts;
3. the forethought and deliberateness exhibited by the crime's execution;
4. the existence of a prior criminal record, and the severity of the prior crimes;
5. the defendant's age and personal circumstances at the time of the offense;
6. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
7. psychiatric evidence; and
8. character evidence.

he came into the restaurant to use the phone. However, either in an attempt to get her to cooperate in opening the restaurant's safe or because of her inability to do so, he held her around the neck and hit her with the gun until part of it broke. He then shot her in the back. Apparently still not feeling finished with his handiwork, appellant went into the kitchen to get a butcher knife. On his return, he proceeded to stab the victim several times in the neck, chest, and thigh, including several wounds which were characterized by the State as "torture type wounds."

The manner in which the offense was committed illustrated some degree of forethought and deliberation on appellant's part. Furthermore, he appeared to be both the planner and the initiator of the crime. Some time before the actual incident, appellant evidently had formulated a plan to rob this Taco Bell because he "needed some money for court." Two of his companions heard him talking about the intended robbery over the phone, and appellant was later heard to ask the driver of the car if "he was going to do that for me" (apparently referring to the robbery considering all of the statements in context). After the driver replied "I guess so," the group proceeded to a house where appellant retrieved another person and was seen to have a gun in his hand. The group then proceeded to the Taco Bell. When they first arrived at the restaurant, appellant and two others got out of the car, but did not enter the restaurant. They got back into the car and began to drive away, but appellant encouraged the driver to turn around and go back.

Appellant was nineteen years old at the time of this offense, and he was shown to have one prior conviction for misdemeanor assault.[3] Appellant had also been stopped for

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[3] The evidence indicated that this conviction began as a felony aggravated assault. The facts show that appellant began seeing a girl whose boyfriend, Christopher Standmier, went off to college after agreeing to have an open relationship. However, when the girl started seeing appel-

the offense of "pedestrian in roadway," whereupon it was discovered that he had outstanding traffic warrants. During a search incident to appellant's arrest on these outstanding warrants, police discovered a baggie in appellant's underwear containing ten rocks of crack cocaine.[4]

While no psychiatric evidence was admitted, character evidence was presented by several high school teachers and other officials, family members, the family's reverend, and various others to which appellant gives us no citation to the record. One high school teacher testified that appellant had threatened to kill him and regularly spoke to him using profanities. However, the teacher also admitted that appellant was sometimes a docile student. One ex-principal testified that appellant had been suspended on two occasions and that appellant had a bad reputation for being a peaceful student who respected authority. Other school teachers and employees testified to the effect that appellant was no worse or made any more trouble than other students.

Looking at the totality of the evidence, we hold that a rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society. *Jackson v. Virginia, supra; Allridge v. State, supra.* Point of error number five is overruled.

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lant, Standmier wrote her cruel letters and broke off the relationship. One day when Standmier was back in town, appellant saw him and began harassing him and a fight ensued. Appellant pulled a baseball bat from his car and struck Standmier in the ribs and broke the bat over his head. Then appellant ran back to his vehicle and pulled out a gun. Standmier backed down and appellant left.

Appellant was originally charged with aggravated assault, but the charges were reduced to a misdemeanor when Standmier got tired of taking off from school to come to court.

[4] The actual weight of the cocaine measured only one-fifteenth gram.

In point of error number one, appellant alleges that the trial court erred in submitting an instruction on the law of parties. He contends that a parties' charge was not raised by the evidence and, therefore, the trial court erred by including it in the jury charge. In *Brown v. State*, 716 S.W.2d 939, 946 (Tex.Cr.App. 1986), this Court held that "any error in charging on the law of parties is harmless if the evidence clearly supports appellant's guilt as a primary actor." *See also Black v. State*, 723 S.W.2d 674, 675 (Tex.Cr.App. 1986). Appellant recognizes this authority, but urges this Court to reexamine this body of law in light of *Black v. State*, 739 S.W.2d 638 (Tex.App. -Dallas 1987, no pet). This we decline to do.

By appellant's own concession, plus the recitation of the evidence set out above, the evidence clearly supports appellant's guilt as a primary actor. Therefore, if any error was committed by including the charge on the law of parties, then such error was harmless. *Brown*, 716 S.W.2d at 946. Point of error number one is overruled.

In his second point of error, appellant complains that the trial court erred in failing to instruct the jury that the witness Jerry Lewis was an accomplice as a matter of law. The question whether Jerry Lewis was an accomplice was presented to the jury as an issue of fact. In support of his contention, appellant refers to the following evidence.

Nickles Lewis testified that once they arrived at Taco Bell Jerry Lewis would occasionally get out of the car. Nickles also told the jury that Jerry Lewis eventually pulled the car up to the side of the restaurant, presumably to better see his companions inside. Appellant testified that Jerry disagreed with the parking place chosen by the driver, Kevin Shaw, and made instructive comments like "[t]hat's too far" and "[p]ark across the street." Also according to appellant, when the group arrived at Taco Bell, Jerry was one of the people who

ra over to see if the trash had been put out.[5] Appellant testified that, once he and two of his companions returned to the car, Jerry asked them "[w]hat's up?". Finally, appellant testified that when the group was fleeing from the restaurant appellant tried to hand the knife to Kevin Shaw, but Jerry Lewis told him to keep it in the back seat. Lastly, Dweilon Duncan testified that Jerry Lewis drove the car back to the Taco Bell after they had left the first time.

Contrary evidence was presented through Jerry Lewis' own testimony. Before the jury, Jerry Lewis denied any involvement in the offense. He specifically denied driving the car at any time and, in fact, told the jury that Kevin Shaw did all the driving. He also testified that Nickles Lewis was the one who instructed Kevin Shaw where to park. Jerry did admit to the jury that he got out of the car, but did so only because he was tired. He also testified that he told Shaw that he was ready to go because they should not be there. Finally, Jerry testified that, as they were driving away after the crime had been committed, appellant apparently threw the gun he had allegedly used into the front seat. And after the car was parked and everyone proceeded to go in separate directions, Jerry Lewis admitted in his testimony that he told Shaw to "[g]et the gun out of [his] grandmother's car."

In *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex.Cr.App. 1986), *cert. denied*, 492 U.S. 925 (1989), this Court said:

> "An accomplice witness is someone who has participated with someone else before, during or after the commission of a crime.
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> * * *
>
> "If the witness cannot be prosecuted for the offense with which the accused is charged, then the witness is not an

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[5] Apparently, the plan was to enter the restaurant when employee Travis Brown opened the door to put out the garbage.

accomplice witness as a matter of law. 5 Apparently, the plan was to enter the restaurant when employee Travis Brown opened the door to put out the garbage.

* * *

"[A] witness is not an accomplice witness merely because he or she knew of the offense and did not disclose it, or even concealed it. [Citations omitted.] The witness' presence at the scene of the crime does not render that witness an accomplice witness."

If there is a doubt whether the witness is an accomplice witness, then that may be submitted to the jury as a fact issue, even though the evidence seems to preponderate in favor of the fact that the witness is an accomplice witness as a matter of law. *Id.; See also Harris v. State*, 738 S.W.2d 207, 216 (Tex.Cr.App. 1986), *cert. denied*, 484 U.S. 872 (1987); *Ex parte Zepeda*, 819 S.W.2d 874 (Tex.Cr.App. 1991).

Given the evidence presented in the instant case, it is clear that there was a conflict as to the degree of participation, if any at all, that Jerry Lewis had in the crime. This being the situation, it was appropriate for the trial judge to present this question to the jury as an issue of fact. Point of error number two is overruled.

In point of error number three, appellant alleges that the trial court erred in failing to modify the special issue on deliberateness to reflect that only the conduct of appellant could be considered in answering that special issue. Specifically, appellant alleges that, while an "anti-parties" instruction was given, it was given only in the abstract. He contends that the first special issue itself should have been modified to specifically instruct the jury that the issue must be answered with reference to appellant's conduct alone.

The jury charge included the following instruction:

"You are further instructed that in answering the Special Issues in this charge relating to punishment, you must

> not consider the instructions given you in the guilt/ innocence phase of the trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. In this punishment phase of trial, you shall consider only the conduct of [appellant], and no other, in determining what his punishment shall be."

Even with this instruction, appellant alleges the jury would not understand the effect of the anti-parties charge on special issue number one[6] and would thus "answer this issue with reference to conduct not directly implicating [a]ppellant."

We disagree and hold that special issue number one and the "anti-parties" charge clearly focused the jury on appellant's own conduct. *Johnson v. State*, 853 S.W.2d 527, 536 (Tex. Cr.App. 1992), *cert. denied*, U.S., 114 S.Ct. 154 (1993). Point of error number three is overruled.

In point of error number four, appellant complains that the trial court erred in failing to instruct the jury on the law of self-defense as it pertained to an extraneous offense admitted against appellant at the punishment phase of trial. Appellant does not complain that a limiting instruction was not given,[7]

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[6] Special issue number one read as follows:

> "Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, [the appellant], that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?"

[7] A limiting instruction was, in fact, included in the charge. It read:

> "You are instructed that certain evidence has been admitted before you of criminal conduct and/or bad acts committed by the Defendant other than the offense for which he is on trial. In that regard, you are instructed that you may not consider such evidence for any purpose unless you first find and believe from the evidence beyond a reasonable doubt that the Defendant committed said criminal conduct or bad acts. If you do not so find or believe from the evidence, you must wholly disregard such evidence. You may consider

nor does he complain that he was prohibited from putting on evidence of any defenses he may have had to any extraneous offenses. Rather, appellant contends that it is a violation of due process to allow a defendant to put on evidence of a defense to an extraneous offense and then deny him the right to a proper instruction explaining the legal effect of such a defense. This is an issue of first impression.

The evidence at trial showed that on the afternoon of January 8, 1990, witness Christopher Standmier was in the parking lot of his mother's apartment complex retrieving some personal items from the trunk of his car when two cars pulled up. From one of the vehicles, appellant yelled at Chris, "Hey, Chris, I'm supposed to be a bitch?".[8] Chris responded that he did not know what appellant was talking about. Appellant then exited the vehicle in which he had been riding. Apparently believing that a fight was about to ensue, Chris told appellant to "come on and get some of this." Appellant then retrieved a bat from inside the vehicle and hit Chris once in the ribs. He then broke the bat over Chris' head. While Chris was recovering from that blow, appellant ran to the car in which he had arrived, pulled out a gun, cocked it, and told Chris, ". . . [G]et back from me. I'll kill you." At this point, Chris raised his hands and said, "Hey, you got me, man." Appellant then left.

While the evidence disputed whether appellant ever actually displayed a firearm, it did not dispute appellant's use of a baseball bat or the fact that Chris never had anything more threatening out than his hands. Furthermore, while the evidence showed that Chris was ready for, and possibly even looking forward to, a fist fight with appellant, he (Chris)

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any defenses the Defendant might have to any offenses."

[8] Apparently, the altercation arose from the fact that Chris' ex-girlfriend was dating appellant. Also, Chris had written the girl some rather heated letters in order to get her to leave him (Chris) alone.

made no overt action towards such behavior other than his statement to "come on and get some of this."

Therefore, even assuming that appellant would have been entitled to a instruction on self-defense, given the facts in the present case, the evidence failed to raise the issue of self-defense.[9] Point of error number four is overruled.

Appellant complains in point of error six that Article 37.071, V.A.C.C.P., is unconstitutional in that it provides no effective vehicle for a jury to apply mitigating evidence.[10] Appellant seems to be complaining that the stated provision is unconstitutional as applied in this case under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The trial court submitted the following instruction:

> "You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating

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[9] This Court stated in *Martinez v. State*, 775 S.W.2d 645, 647 (Tex.Cr. App. 1989):

> "Where a defensive theory is raised by the evidence, the trial court, upon proper request, must instruct the jury on the defensive theory without regard to whether such evidence was strong or weak, uncontradicted or impeached. [Citation omitted.] Integral to a determination of whether the evidence raised self-defense . . ., we look to whether [appellant] reasonably believed the use of [such] force was immediately necessary and whether [appellant's] assessment of the situation reasonably indicated he could have retreated."

See V.T.C.A., Penal Code, Section 9.31. It is clear that a reasonable person in appellant's situation would have retreated or, at a minimum, used a lesser amount of force than that which appellant actually employed.

[10] Appellant makes rather vague references to some general facts in his statement of facts at the beginning of the brief. However, he does not refer to these facts in his argument on this point. Nor does appellant point out where in the record we can find the majority of these vague references. (The facts we can find are: that appellant "had problems with his father"; that he was sometimes a "docile" student; that he seemed "sincerely remorseful"; and that he had an IQ of 78.)

evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

"In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are 'Yes,' and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues 'No' in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

"You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of

> you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve."

This instruction complied with *Penry* and provided a sufficient vehicle for the jury to consider any mitigating evidence appellant offered. See *Fuller v. State*, 829 S.W.2d 191, 209 (1992). Point of error number six is overruled.

In his seventh point of error, appellant claims the trial court erred in overruling his motion for a new trial based on a violation of the pretrial discovery order. Specifically, appellant claims that the section of the order requiring "[a]ll known convictions, pending charges or *suspected criminal offenses* concerning any *accomplice* proposed to be used as a witness by the State[,]" (emphasis added) was violated by the State's failure to disclose the "arrests and possible pending charges" of witnesses Dweilon Duncan and Nickles Lewis for an extraneous burglary of a habitation.[11] Appellant argues that this information should have been disclosed to him pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 316 (1964), and *Butler v. State*, 736 S.W.2d 668, 670 (Tex.Cr.App. 1987).

In regard to the State's failure to reveal the arrest of Dweilon Duncan, appellant has provided this Court with some facts surrounding the arrest, but provided no argument concerning the effect this evidence may have had on the outcome of the trial. Having presented us with nothing to review, we will not consider this point as to Duncan. Tex.R.App.Proc. 74. However, in regard to the arrest of Lewis, appellant states that witness Lewis was on felony probation and the arrest for burglary could have been used to

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[11] The burglary and the arrests occurred after the instant offense was committed, but before the capital murder trial commenced.

revoke that probation. Thus, appellant alleges, Lewis had an incentive to falsify his testimony.[12]

In *United States v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 3379, 87 L.Ed.2d 481 (1985), the United States Supreme Court explained that:

> ". . . [t]he holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.' [Citations omitted.]
>
> * * *
>
> "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.
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> * * *
>
> ". . . unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . ."

The *Bagley* Court also stated that impeachment evidence as well as exculpatory evidence falls within the *Brady* rule, for such evidence is "evidence favorable to an accused, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."

The potential constitutional error in *Bagley* did not involve any direct restriction on the scope of cross-examination as in Davis v. Alaska.[13] Rather, any error that may have existed

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[12] Appellant fails to mention, however, that Lewis' arrest for his involvement in the pending capital murder could have provided this same incentive.

[13] In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347

was the government's "failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination." *Bagley*, *supra*. Such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. *Id.* The conviction must be reversed only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. *Id.*

The *Bagley* Court held that the standard of materiality applicable to the nondisclosed evidence is that set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court deemed this standard sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the accused whether there has been no request for the evidence, a general request only, or a specific request. *Bagley*, *supra*. This standard is that:

> "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

(1974), the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. By this cross-examination, the defense intended to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination.

The United States Supreme Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" See *Bagley*, *supra*.

This standard was adopted by our Court in Ex parte Adams, 768 S.W.2d 281, 289-90 (Tex.Cr.App. 1989).

As in *Bagley*, the error, if any, in the present case does not involve any direct restriction on the scope of cross-examination. Rather, it involves the government's "failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination"; (that is, by failing to provide information that might have been used to impeach a government witness]. Looking at the totality of the circumstances, we cannot conclude that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Appellant maintains that Lewis was on felony probation and the arrest for burglary could have been used to revoke that probation, therefore, Lewis had an incentive to falsify his testimony. What appellant fails to mention, however, is that the same incentive might have arisen from Lewis' involvement in the instant case. Furthermore, appellant fails to mention that the victim of the burglary knew Lewis and, because some restitution was apparently paid or other arrangements made, the complainant chose not to press charges and the case was closed by the investigating officer before the trial in the instant case commenced. Nonetheless, appellant was not restricted on his cross-examination of this witness from asking questions about possible deals or inducements made in return for his testimony. Thus, we conclude that, had appellant had the information about the burglary arrest during the trial, there is no reasonable probability that the result of the proceeding would have been different. Point of error number seven is overruled.

Appellant raises both a *Batson*[14] challenge and a challenge to Article 35.261, V.A.C.C.P., in point of error number eight.

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[14] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

He complains that the trial court erred in overruling his objection to a peremptory challenge exercised against minority venireperson, Naomi Turner.[15]

To be entitled to a *Batson* hearing after objection, a defendant must first make a prima facie showing of purposeful discrimination on the part of the State. Once such a showing is made, then the burden shifts to the State to give race-neutral reasons for his exercise of a peremptory strike. After race-neutral reasons are supplied, then the defendant bears the burden of rebutting the explanation proffered by the State. *Batson*, supra. While we can find no place in the record where appellant actually objected to the strike used by the State or moved for a dismissal of the array, we will address the merits of this point as both parties do in their briefs.[16]

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[15] Appellant mentions that on appeal he also assigns error to the striking of venireperson John Smith. However, he does not argue this point in relation to Smith and, therefore, we will not address it. *See* Tex.R. App. Proc. 74.

[16] While appellant filed a pretrial Motion to Restrict *Use* of Peremptory Challenges, he does not seem to have otherwise objected at trial to the striking of veniremember Naomi Turner. The only attempts at preservation we found consisted of the following occurrences. First, after venire member Naomi Turner was questioned by both parties, the trial court excused her from the courtroom. The State exercised a peremptory strike and the trial court, without prompting from appellant, stated:

> "To save time, why don't we go ahead and have a Batson hearing now so we'll know whether we have to start jury selection all over again."

At that time, the State gave several reasons for striking Turner and appellant was allowed to cross-examine. The trial court then stated that it was withholding making a ruling until the end of jury selection. Appellant requested that the veniremember be placed on the jury at this time and the trial court denied the request.

Secondly, after all of the prospective jurors had been questioned, the trial court offered appellant an extra strike for the remaining juror to be seated. Before he made a decision on whether to accept the extra strike,

In *Vargas v. State*, 838 S.W.2d 552 (Tex.Cr.App. 1992), we adopted, for appellate purposes, the "clear error standard of review" as explained by the United States Supreme Court in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). In applying this standard, we must determine whether the trial judge's decision is supported by the record so that it is not clearly erroneous. *Vargas*, supra; *Emerson v. State*, 820 S.W.2d 802 (Tex.Cr.App. 1993). This includes a review of the voir dire, the racial makeup of the venire, the prosecutor's neutral explanations, and appellant's rebuttal and impeaching evidence. *Id.*

In the instant case, the prosecutor gave several reasons for peremptorily striking the veniremember including:

1. She made statements about police officers that the younger ones were very arrogant and could be disrespectful in the South Dallas area.

2. She cited at least three incidents where she felt the police had acted inappropriately—one where her brother was arrested, one where she was hit by another driver, and a third where she said a police officer was being rude to her.

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appellant requested that Naomi Turner be seated as the twelfth juror—a request which the trial court again denied. Appellant then stated that:

> "[I]t is my understanding that. . . we would still be entitled to have a *Batson* hearing in which if the Court is so convinced [that the veniremember was struck for racial reasons] then the whole panel would then be flushed."

Presumably appellant was referring to the quashing of the entire panel which is the only remedy available under Article 35.261, V.A.C.C.P.

While neither occurrence technically suffices to preserve this point of error, we will address the merits since neither party argues that the point was not preserved and both argue the merits. See generally, *Williams v. State*, 773 S.W.2d 525, 533-34 (Tex.Cr.App. 1988), *cert. denied*, 493 U.S. 900 (1989).

3. She indicated that her brother was on probation for some assaultive offense against his wife. However, she never appeared to have any interest in finding out the details because "she was not the one to pass judgment."
4. She indicated that she had a nephew in the penitentiary who was near the defendant's age. But, again, she didn't know for what he was incarcerated.
5. Finally, she indicated in regard to the second punishment issue that she would want to be shown a prior record or something more than just the facts of the case.

The prosecutor testified that his decision to strike Turner was based on the totality of the above-stated reasons and not on any one particular answer. After the State finished, appellant was given the opportunity to question the prosecutor and was able to elicit the facts that the State had not questioned the veniremember as to specific names of officers or whether she even remembered any names. Appellant was also able to explore the potentially disparate treatment of other non-minority veniremembers who appeared to have "problems" with police officers or had relatives in jail for unknown crimes but were not peremptorily struck by the State. In his appellate brief, appellant also brought out the fact that the State struck seven minority persons in all, and two blacks served on the jury. Also, he again relied heavily on the fact that other veniremembers whom the State found acceptable possessed some of the same characteristics that the prosecutor claimed to have caused him to excuse venireperson Turner. The trial court then withheld its ruling until the end of jury selection, but eventually allowed the peremptory to stand.

We stated in *Cantu v. State*, 842 S.W.2d 667 (Tex.Cr.App. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 3046 (1993) that:

> "'Disparate treatment,' as such, cannot automatically be imputed in every situation where one of the .State's

reasons for striking a venireperson would technically apply to another venireperson whom the State found acceptable. [Citations omitted.] The decision to strike a particular venireperson is not susceptible to rigid quantification; rather, it is a fluid process, often hinging on the interaction of a number of variables and permutations. [Citation omitted.] For example, it is unlikely that two venirepersons on one panel will possess the same objectionable attribute or character trait in precisely the same degree. Such qualitative distinctions may cause a prosecutor to challenge one venireperson and not the other. [Citations omitted.]

"Thus, when the State has offered more than one plausible reason for striking a venireperson, it is proper to review these reasons in their entirety in order to assess whether the State's explanation was valid or merely pretextual. Where, as here, the State has offered numerous race neutral reasons for its challenge, we cannot say that the fact that there were other acceptable jurors possessing one or more of these objectionable attributes, is sufficient to establish disparate treatment."

This statement applies just as readily to the present case. As the United States Supreme Court stated in *Hernandez*, supra, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Thus, looking at the entirety of the record and giving deference to the trial judge, who was present to assess the credibility of the prosecutor and his explanations[17], we hold in the instant case that the decision of the trial court was not clearly erroneous. Point of error number eight is overruled.

Finding no reversible error, we affirm the conviction and sentence of the trial court.

McCormick, Presiding Judge

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[17] See *Cantu*, supra.

(Delivered June 22, 1994)
En Banc
Do Not Publish

Miller, J., concurs in the result
Clinton, J., dissents

XVII.

REPLY TO APPLICANT'S GROUND FOR RELIEF SEVENTEEN

This ground for relief is procedurally barred because the identical claim was both raised and decided on the merits on direct appeal. In the alternative, the mitigation instruction submitted to the jury was approved by the Texas Court of Criminal Appeals and is constitutionally sufficient.

Applicant claims that his death sentence is violative of both the Eighth and Fourteenth Amendments to the federal constitution because the jury instructions failed to supply "an adequate vehicle for the jury to give effect to Applicant's mitigating evidence" in accordance with the United States Supreme Court opinion in *Peng v. Lynaugh*, 492 U.S. 302 (1989). U. S. CONST. amends. VIII, XIV; Applicant's Writ at 190. This claim is procedurally barred as it was both raised and decided on the merits on direct appeal. Alternatively, the record affirmatively reflects that Applicant received an instruction on mitigation which was approved by the Texas Court of Criminal Appeals and was sufficient to meet the dictates of *Penry*.

Procedural Bar

Applicant concedes that he raised this identical complaint on direct appeal and that the Court of Criminal Appeals overruled his claim on the merits. Applicant's Writ at 196; *see also* Applicant's Writ Exhibit 15, (Point of Error 6); *Smith v. State*, No. 71,333 at 10-11 (Tex. Crim. App. June 24, 1994) (unpublished). Issues which have been raised and rejected on direct appeal provide no basis for habeas relief and are procedurally barred. *See Ex parte Ramos*, 977 S.W.2d at 617 (holding that a claim which was raised and rejected on direct appeal is generally not cognizable in a writ of habeas corpus);

Ex parte Acosta, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (same); *see also Ex Parte Schuessler*, 846 S.W.2d 850, 852 n. 6 (Tex. Crim. App. 1993). The only exception to this procedural bar occurs in rare situations where a direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathered in a habeas corpus proceeding. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). For example, in most instances, the record on direct appeal is inadequate to develop an ineffective assistance of counsel claim and the more appropriate vehicle for fully developing this claim is a writ of habeas corpus. *Id.* Other examples include situations where the prior judgment of the Court of Criminal Appeals is subsequently rendered void or where the Court has decided to apply relief retroactively after a subsequent change in the law. *Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994). The case at bar, however, does not present an exception to the general rule.

Applicant has already raised this identical issue regarding the "*Penny*" charge on direct appeal. This identical argument was rejected by the Court of Criminal Appeals. *Smith v. State*, No. 71,333 at 10-1.1 (Tex. Crim. App. June 24, 1994) (unpublished). Applicant has failed to provide any new or different allegations that would warrant re-consideration of these claims. Nor does Applicant argue that there has been a subsequent change in the law so as to render the judgment void or mandate a retroactive application of a new rule of law. Therefore, Applicant's request for habeas relief should be denied.

Applicant's Claim is Without Merit

Assuming, *arguendo*, that this issue is deemed to be properly presented, the State contends that relief should be denied on the merits. The appellate record affirmatively reflects that Applicant received an instruction authorizing the jury to show

mercy if the mitigating evidence warranted a penalty less than death. (CR:114-115). That instruction is as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the special issues are "Yes," and you believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

> You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

(CR:114-115). On direct appeal, the Court of Criminal Appeals specially held that this charge complied with *Penry*, and provided a sufficient vehicle for the jury to consider any mitigating evidence offered by Applicant. *Smith v. State*, No. 71,333 at 10-11 (Tex. Crim. App. June 24, 1994) (unpublished).

Similar instructions have been held constitutional by the Court of Criminal Appeals in a plethora of other cases. *See, for example, Robertson v. State*, 871 S.W.2d 701, 710 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 853 (1994) (holding that a separate "special issue" on mitigation is not required under *Penry* and that a "nullification" charge is sufficient to meet the commands of Penry); *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 941 (1993) (holding that a nullification charge "was adequate to avoid the constitutional infirmity condemned by *Penry* because we do not perceive 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevented] the consideration of constitutionally relevant evidence," citing to and relying on *Boyde v. California*, 494 U.S. 370 (1990)). *See also Mason v. State*, 905 S.W.2d 570, 576 (Tex. Crim. App. 1995); *Coleman v. State*, 881 S.W.2d 344, 356 (Tex. Crim. App. 1994); *Coble v. State*, 871 S.W.2d 192, 206-207 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 829 (1994); *San Miguel v. State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993). Additionally, the Court has not limited instructions for *Penry* purposes to only this form of instruction. Rather, the Court has found instructions other than a "jury nullification" charge to also be sufficient for *Penry*

purposes. *See, for example, State v. McPherson*, 851 S.W.2d 846, 847-50 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 939 (1993) (holding that the submission of a fourth punishment issue provided the jury a "means of considering and giving effect to mitigating evidence," was an appropriate response to *Penry*).

It is important to note that, in its *Penry* opinion, the Supreme Court failed to specify what particular vehicle was required under the Eighth Amendment "for the jury to give mitigating effect to" a defendant's mitigating evidence which falls beyond the scope of the statutory punishment issues. *Penry*, 492 U.S. at 324-328. While it is true that the Texas Legislature later codified *Penry* in 1991 amendments to the Texas statutory death penalty scheme, *see* Tex.S.B. 880, Sec. 5, 72nd Leg., R.S. (1991) V.T.S.L.S. Chapter 838, that fact alone does not mandate a repudiation of cases in which a defendant received a "jury nullification" charge or other form of instruction in an effort to guide the jury's discretion on the appropriate effect of mitigating evidence.

Furthermore, Applicant's mitigating evidence was not truly "*Penry*" type evidence. Some of the evidence relied on by Applicant shows only poor family history, which does not necessitate a *Penry* instruction. *Trevino v. State*, 815 S.W.2d 592, 622 (Tex. Crim. App. 1991), *remanded on other grounds*, 503 U.S. 562 (1992) (holding that evidence of a turbulent family history does not necessitate a special *Penry* instruction). Other evidence was merely "good character" evidence offered by friends and family members. Likewise, this is not *Penry* evidence. *See Norris v. State*, 902 S.W.2d 428, 448 (Tex. Crim. App. 1995); *Muniz v. State*, 851 S.W.2d 238, 256 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 837 (1993). The nature of the evidence does not mandate a mitigating instruction.

Conclusion

Because this issue was raised and addressed on the merits on direct appeal, Applicant is procedurally barred from having this issue considered on habeas. Additionally, assuming the evidence merited an instruction on mitigation, the appellate record reflects that Applicant received an appropriate instruction authorizing the jury to consider mitigating evidence and to show mercy if the jury concluded that the weight of that evidence demanded it. Applicant's seventeenth ground for relief should be denied.

State's Brief on Submission to the
Texas Court of Criminal Appeals

Oral Argument Requested

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AT AUSTIN

No. 74, 228

EX PARTE

LAROYCE LATHAIR SMITH

On application for Writ of Habeas Corpus
From the 265th Judicial District Court
Dallas County, Texas
Cause No. W91-22803-R

STATE'S BRIEF

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The State of Texas submits this brief to the Honorable Court of Criminal Appeals in reply to the brief and supplemental brief of applicant. LaRoyce Lathair Smith.

STATEMENT OF THE CASE

Applicant filed a state application for writ of habeas corpus seeking relief from his capital murder conviction and death sentence. The trial court issued findings of fact and conclusions of law, recommending the denial of relief. This Court ordered the application filed and set for submission on applicant's seventeenth allegation of error.

STATEMENT OF FACTS

Applicant and his companions robbed the employees of the Taco Bell restaurant where applicant once worked, and during that robbery, applicant pistol whipped, shot, and stabbed to death his former co-worker, Jennifer Soto.

SUMMARY OF ARGUMENT

Applicant proffered no evidence that warranted a supplemental mitigation instruction. And assuming one was necessary the supplemental instruction applicant's jury received was constitutionally sound

ARGUMENT

In his seventeenth ground for relief, applicant contends the trial court's punishment charge violated his Eighth and Fourteenth Amendment rights under the federal Constitution because (1) it did not provide the jury with a vehicle by which it could consider and give mitigating effect to evidence of his "limited mental capacity" and "difficult family background." and (2) it interfered with the jury's consideration of all relevant mitigating evidence offered by applicant. Applicant predicates his contention primarily on the U.S. Supreme Court's recent opinion in *Penry v Johnson*, 532 U.S. 782. 121 S.Ct. 1910. 150 L.Ed.2d 9 (2001) (*Penry II*). In particular, applicant likens the instruction his jury received regarding

mitigating evidence to the instruction held constitutionally deficient in *Penry II.*

Unlike Penry, however, applicant proffered no evidence that warranted a supplemental mitigation instruction. And assuming one was necessary, the supplemental instruction applicant's jury received was constitutionally sound.

Supplemental Mitigation Instruction Unnecessary

Not all mitigating evidence warrants a supplemental instruction. *See Graham v. Collins*, 506 U.S. 461, 476-77 (1993) (mete fact that mitigating evidence could be viewed as having *"same* arguable relevance beyond the special issues" does not entitle defendant to supplemental mitigation instruction) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 180 n.10 (1988)). Only constitutionally relevant mitigating evidence that cannot be given effect by the special issues requires one. *Boyd v. Johnson*, 167 F.3d 907, 911 (5th Cir. 1999), *cert. denied*, 527 U.S. 1055 (1999) (citing *Davis v. Scott*, 51 F.3d 457, 460 (5th Cir. 1995). *cert. denied*, 516 U.S. 992 (1995)).

The Supreme Court found Penry's mental retardation and severe childhood abuse constitutionally relevant to the jury's punishment determination because they diminished his ability "to control his impulses or to evaluate the consequ4nces of his conduct," and, thus, reduced his moral culpability. *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (*Penry I*): *see also Graham*, 506 U.S. at 473. But Penry's retardation and abuse constituted a "uniquely severe permanent handicap" with which he was burdened through no fault of his own. *Boyd*, 167 F.3d at 911-12 (citing *Davis*, 51 F.3d at 460). Furthermore. Perin: attributed his crime to that handicap. *Penry I*, 492 U.S. at 308-09.[1]

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[1] "In Dr. Garcia's judgment. *Penry* was suffering from an organic brain disorder at the time *of the offense* which made it impossible for him to appreciate the wrongfulness of his conduct or *to* conform his conduct to the law." (emphasis added)

Even assuming applicant's mental limitations and troubled family life were handicaps, they were neither unique nor severe; nor was his crime attributable to them. Thus, they were irrelevant to his moral culpability and warranted no supplemental instruction.

(1) No Evidence of a "Uniquely Severe Permannt Handicap"

As evidence of his mental limitations, applicant cites testimony and school records indicating his behavior was "exemplary," but that he was a "stow learner" with an I.Q. of seventy-eight and learning disabilities that were possibly organic in origin.[2] Psychological counseling was recommended, and applicant attended special education classes until the eighth grade: nevertheless, he failed a state slips test and dropped out of school in the ninth grade at the age of eighteen.[3] (RR28: 120-30: RR29: 28, 34: RR32: 14-42. 125: Defense Exhibits 38-55).

These facts evince no uniquely severe handicap. Applicant's I.Q. is not indicative of retardation: it is above that of even mildly retarded persons. *See Ex parte Tennard*, 900 S.W.2d *57*.60-61 (Tex. Crim. App. 1997). *cert. denied*, 524 U.S. 956 (1998) (noting classification as "mentally retarded" under AAMR standards generally requires I.Q. of seventy or below). An applicant's I.Q. and learning disabilities do not, in and of themselves, indicate an inability to control his impulses or evaluate the consequences of his conduct *See Madden v. Collins*, 18 F.3d 304. 308 (5th Cir. 1994), *cert. denied*, 513 U.S. 1156 (1995) (although defendant's learning

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[2] A school psychologist opined that applicant's-mother's gestation diabetes and the seizures she suffered during applicant's birth could be the organic cause of applicant's learning problems. (RR32: 27-28: Defense Exhibit 43).

[3] This testimony came from applicant, his mother, and Alberta Pingle, a DISD employee who related the contents of the school records.

disability could be defined as an organic brain impairment, it was not so uniquely severe that it give rise to a *Penry I* claim). In fact, applicant's normally "exemplary" behavior, notwithstanding these deficiencies, indicates the opposite. (RR32: 41-42; Defense Exhibit 52).

Furthermore, applicant fails to relate his background evidence to any handicap, severe or otherwise. He cites testimony of the emotional and financial hardships engendered by his father's drug use, criminal history, mistreatment, and abandonment. (RR28: 126, 134-145; RR29: 38-40; RR32: 11, 89-93). But applicant does not demonstrate how any hardship affected his ability to control or evaluate his conduct. *See Madden*, 18 F.3d at 308 (defendant's troubled childhood. including possible abuse, not constitutionally relevant mitigating evidence where no showing it had any psychological effect on him); *Barnard v. Collins*, 958 P.2d 634, 638-39 (5th Cir. 1992), *cert. denied*, 510 U.S. 1102 (1994) (defendant's childhood experiences did not support Penry claim give absence of any evidence that those experiences led to any mental impairment or psychological problem to which crime could be attributed). Absent evidence of any psychological impact, applicant's familial hardships fall well short of the "handicaps" evidence contemplated by *Penry I*.

(2) No Nexus Between Applicant's Evidence and His Crime

In addition, unlike Penry's retardation and abuse, applicant's mental limitations and troubled family background had no connection to his crime. A defendants disadvantaged background or emotional and mental problems bear on his moral culpability only if his crime can be attributed to them. *See Penry I*, 492 U.S. at 319 (citing *California v. Brown*, 479 U.S. 538, 545 (1987)); *Boyd*, 167 F.3d at 912. Thus, absent some link to his crime, applicant's evidence of background and mental limitations was irrelevant to his moral culpability

and, thus, the jury's punishment determination. *See Boyd*, 167 F.3d at 912 (defendant's low IQ was irrelevant mitigating evidence given absence of any showing that defendant's crime attributable to that fact); *Madden*, 18 P.3d at 308 (defendant's troubled childhood, including possible abuse, constitutionally irrelevant absent evidence that abuse had some psychological effect on defendant that led to his crime).

Applicant neither claims nor demonstrates any link between his background or mental limitations and his crime. He maintains, instead, that the law no longer requires such a nexus. He infers this from the Supreme Court's order vacating and remanding *Robertson* v. *Johnson*, 234 F.3d 890 (5th Cir. 2000) in light of *Penry II*. In addition, he argues that the Fifth Circuit disavowed a nexus requirement *Dowthitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1250 (2001). Applicant is wrong on both counts.

As of yet, no court has determined whether Robertson was entitled to a supplemental instruction in the first place. The Fifth Circuit originally denied certificate of appealability (COA) in *Robertson* based solely on the conclusion that the supplemental instruction given satisfied the dictates of *Penry I*. *Robertson*, 234 F.3d at 899. Consequently, the fact that the Supreme Court vacated and remanded *Robertson* or that the Fifth Circuit has since granted COA says nothing new about what kind of evidence requires a supplemental instruction. *See Robertson* v. *Cockrell*, No. 10512, 2002 U.S. App. LEXIS 729, at *2 (5th Cir. Jan. 17, 2002).[4]

And contrary to applicant's assertion, the Fifth Circuit did not disavow a nexus requirement. Applicant relies upon a footnote in *Dowthitt* quoting *Williams v. Taylor*. 529 U.S. 362

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[4] The Attorney General filed a motion for rehearing in *Robertson* on January 30, 2002. As of the date the State filed this brief, the motion is still pending before the Fifth Circuit.

(2000).[5] Applicant misinterprets that quote. When read in context, it is readily apparent that the quote is merely a re-statement of *Penry I,* i.e., that some mitigating evidence may have relevance outside of the special issues. Furthermore, the Fifth Circuit recently employed the nexus requirement in *Hernandez v. Johnson*, 248 F.3d 344,349 (5th Cir.), *cert. denied*, 122 S.Ct. 621 (2001), dismissing any suggestion that the court *has* disavowed the requirement.

In sum, because applicant presented no evidence of a uniquely severe handicap to which his crime could be attributed, he had no right to a supplemental instruction under *Penry I.* Thus, applicant fails to meet his burden of proving facts that would entitle him to habeas corpus relief. *Ex parte Maldonado*, 688 S.W.2d 414. 116 (Tex. Crim. App. 1985) (in a post-conviction collateral attack, burden is on applicant to allege arid prove facts which, if true, entitle him to relief).

(3) Mitigating Effect Possible Through Special Issues

Furthermore, its irrelevance notwithstanding, any mitigating quality that applicant's mental limitation and background evidence did have was not placed beyond the jury's effective reach. The jury could have given mitigating effect to that evidence by its answers to the deliberateness and future dangerousness special issues.

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[5] The *Dowthitt* footnote reads:

> We pause briefly to address the parties' arguments regarding the "nexus" requirement for a mitigation defense. So far as the State *is* asserting that mitigating evidence "not connected to the crime or future dangerousness" cannot be considered, it is not consistent with the Supreme Court's most recent statement on this issue: "Mitigating evidence unrelated to dangerousness alter the Jury's selection of penalty even if it does not undermine or rebut the prosecution's death-eligibility case." *(Terry) Williams* v. *Taylor*, 529 U.S. 362. 120 S.Ct. 1495, 1516, 146 L.Ed.2d 389 (2000).

Dowthitt, 230 F.3d at 759 n.15.

Applicant's IQ and learning difficulties were relevant to the question of whether he was capable of acting "deliberately." *Penry, I,* 492 U.S. at 322. The jury could have concluded that applicant could not carefully or thoroughly consider his conduct during the robbery and murder. Based on such a conclusion, the jury could have answered the deliberateness special issue "No." *See Tennard*, 960 S.W.2d at 62 (evidence of defendant's low IQ not beyond jury's effective reach because could have been used to answer deliberateness special issue "No").

In addition, the jury could have given mitigating effect both to applicant's mental limitations and his troubled family background in its determination of his future dangerousness. There was no evidence that applicant was unable to learn from his mistakes as a result of his hardships or learning disabilities. Indeed, the evidence showed that notwithstanding the difficulties he faced, applicant's behavior was usually exemplary." (RR32: 41-42; Defense Exhibit 52-55). Thus, the jury could have concluded, as the defense argued in closing, that applicant's conduct could be controlled in the structured environment of prison. (RR33: 53). Based on such a conclusion, the jury could have answered the future dangerousness issue "No.1." *See Graham*, 506 U.S. at 475-76 (jury could have concluded from evidence of defendant's background and character that crime was an aberration and defendant would pose no future danger); *Davis*, 51 F.3d at 454 (evidence of mental instability did not compel negative answer to future dangerousness special issue where no evidence defendant unable to learn from mistakes and other evidence demonstrated defendant responded positively to structured environment).

Applicant's Supplemental Mitigation Instruction
Satisfied *Penry I*

If, however, applicant's jury needed a vehicle other than the special issues for giving effect to some relevant mitigating

evidence, the supplemental instruction they received provided them one. Applicant summarily assets that the supplemental instruction in his case was "virtually" and "materially" identical to that given in *Penry II*. But the instructions are similar only to the extent that they both define and discuss mitigating evidence generally.

The *Penry II* instruction did not incorporate the abstract instructions defining mitigating evidence into any of the verdict form's special issues. It simply told the jury to "give effect and consideration to [mitigating circumstances] in assessing the defendant's personal culpability at the time you answer the special issue" by making negative finding to one of the special issues. *Penry II*, 121 S.Ct. at 1917.

This instruction did not notify the jurors they might encounter mitigating evidence that bore no relation to the special issues: nor did it tell them what to do with it if they did. Thus, on its face, the *Penry II* instruction did not provide the jury with a mechanism for giving effect to mitigating evidence it found irrelevant to the special issues. The only way a jury could vote for life based on such evidence would be to answer a special issue untruthfully, an act the charge did not, on its face, authorize. In essence, the charge put the jury in the untenable position of having to follow one instruction (the deliberateness or future dangerousness special issues) over the other (the supplemental instruction) without any guidance for doing so. *Penry II*, 121 S.Ct. at 1022 ("jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict").

In contrast, applicant's instruction expressly notified the jury that it might hear mitigating evidence unrelated to the deliberateness and future dangerousness special issues:

> You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find

> such evidence is mitigating under these instructions, you shall consider it in the following instructions . . .

(CR: 114).

Furthermore, unlike the *Penry II* instruction, applicant's instruction not only told the jury to consider such evidence in answering the special issues, it told them how to answer the special issues so that they might give mitigating effect to it. In short, the instruction plainly and definitively told the jury to change one of their affirmative answers to the special issues to a negative answer:

> In answering the Special Issues submitted to you herein, if you believe the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes." and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you.

(CR: 115).

Thus, unlike the *Penry II* jury, applicant's jury did not have to read anything into the mitigation instruction or confront the dilemma of choosing one of the court's instructions over the other. Applicant's instruction expressly authorized the jury to change its answer to one of the special issues based on any mitigating evidence that, while bearing no relation to the special issues, nonetheless, warranted the imposition of a life sentence. Given this explicit instruction, the jurors did not have to violate their oath to follow the charge because, unlike the *Penry II* jurors, they knew that the mitigation instruction could "trump" the special issues.

In sum, applicant's instruction did what the *Penry II* instruction only purported to do. It authorized the jury to give effect to any *Penry I* evidence by nullifying its answer to one

of the special issues. In so doing, it did not violate applicant's constitutional rights: it ensured them.

The State recognizes that applicant's instruction is similar to the instruction held deficient in *Robertson. Robertson*, 234 F.3d at 894-95. Based on the distinctions discussed above, however, the State vehemently disagrees with the Fifth Circuit Court's conclusion in *Robertson* that there was "no substantial difference" between the *Robertson* and *Penry II* instruction. Furthermore, the State contends that *Robertson* is not persuasive authority. It provides no comparative analysis of the *Robertson* and *Penry II* instructions. And as previously noted, a motion for rehearing is currently pending in the case.

Lastly, it tests the bounds of reason to grant applicant relief based on a good-faith attempt to give him a supplemental instruction to which he was not constitutionally entitled. Given the absence of any *Penry I* evidence, the instruction applicant's jury received was, at worst, mere surplusage.

For all the foregoing reasons, this Court should find applicant's seventeenth allegation of error unfounded and deny his request for habeas corpus relief.

PRAYER

The State prays this Honorable Court will deny applicant's request for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The State mailed a copy of this brief to applicant's attorneys: Jan Hemphill, 4519 West Lovers Lane, Dallas, Texas 75209-3171, and Craig A. Harris, Winstead Sechrest & Minick. P.C., 5400 Renaissance Tower, 1201 Elm Street, Dallas, Texas 75270-2199 on February 5, 2002.

/s/ Lisa Braxton/Smith
LISA BRAXTON/SMITH

Opinion on State Habeas, Texas Court of Criminal Appeals
Ex Parte LaRoyce Lathair Smith,
132 S.W. 3d 407 (Tex. Crim. App. 2004)

COURT OF CRIMINAL APPEALS OF TEXAS

No. 74228

Ex parte LAROYCE LATHAIR SMITH,
Applicant.

April 21, 2004

OPINION

COCHRAN, *J.*, delivered the opinion of the Court, joined by KELLER, *P.J.*, MEYERS, WOMACK and JOHNSON, *JJ.*

We deny habeas corpus relief in this case because there was no constitutional infirmity in applicant's capital-murder punishment-phase jury instructions. First, applicant's mitigation evidence was not *Penry I* evidence; therefore, the jury could give effect to this evidence within the scope of the two special issues. Second, we find no error in the trial court's supplementary nullification instruction. I.

In 1991, a Dallas County jury convicted applicant of capital murder for the robbery-murder of Jennifer Soto. During the punishment phase, applicant introduced evidence that he had a difficult family life as a child and that he was mentally slow, though not mentally retarded. Under the law in effect at the time of the trial, the jury was then given two special issues during the punishment phase: First, was the killing deliberate? And second, does the defendant pose a continuing danger to others? Because this trial took place during that

two-year hiatus between the Supreme Court's decision in *Penry I*[1] and the Texas Legislature's enactment of a new statutory special issue in response to *Penry I*,[2] the trial judge also gave the jury a non-statutory nullification instruction. That supplemental instruction read:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evi-

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[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*).

[2] *See Robertson v. Cockrell*, 325 F.3d 243, 249 (5th Cir.) (*en banc*) (noting that "dozens" of capital trials were conducted during this "hiatus" using an extra-statutory *Penry I* nullification instruction), *cert. denied*, 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003).

dence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

These supplemental instructions explicitly told the jury that:

1. It "shall" consider any and all mitigating evidence;

2. The mitigating evidence might, but need not, relate to the defendant's character, record, background, or any circumstances of the offense;

3. Mitigating evidence is any evidence which reduces the defendant's personal or moral culpability or blame worthiness;

4. Mitigating evidence need not have any relationship to either of the Special Issues;

5. The jurors need not be unanimous about what specific evidence each one considers mitigating;

6. The jurors each decide what evidence is mitigating and how much weight to give it;

7. If the jury finds, from the mitigating evidence, that the defendant should not be sentenced to death, then it

"shall" answer one of the Special Issues "No"; and

8. The State must prove, beyond a reasonable doubt, that the death penalty should be imposed despite the mitigating evidence.

Based upon the evidence admitted at trial and the trial judge's instructions, the jury found that the State carried its burden on the special issues[3] and proved, beyond a reasonable doubt, that a death sentence should be imposed despite applicant's mitigating evidence. Therefore, the trial judge sentenced applicant to death.

On direct appeal, applicant claimed that, under *Penry I*, Article 37.071 was unconstitutional as applied to him because the jury was unable to give effect to his mitigating evidence in answering the special issues. We rejected this claim and held that, regardless of whether applicant's mitigating evidence was beyond the scope of the two statutory special issues, the judge's extensive supplemental instruction provided a sufficient vehicle for the jury to consider all of applicant's mitigating evidence.[4]

Applicant filed an original writ of habeas corpus in the convicting court in 1998, but we dismissed that writ as untimely filed. After the Legislature revised Article 11.071, § 4A, to permit applicant to file a new writ, he timely filed

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[3] These special issues were:

(1) Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(2) Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

[4] *Smith v. State*, No. 71,333 slip op. at 10-11 (Tex.Crim.App. June 22, 1994) (not designated for publication).

another writ and now claims that the trial judge's supplemental "nullification" instructions were unconstitutional under *Penry II*.[5] Applicant argues that his supplemental jury instructions were "virtually identical" to those given in *Penry II*, and his mitigation evidence was similar to that offered in *Penry II*. Therefore, he claims, he is entitled to relief under *Penry II*.

We disagree. First, the present supplemental instructions are similar to those given in *Penry II* only to the extent that both were "nullification" instructions. Otherwise, they are dissimilar in ways that render the present instruction constitutionally sufficient. Second, applicant's evidence of an unhappy childhood and as a slow learner is simply not the "two-edged sword" type of evidence contemplated in either *Penry I* or *Penry II*. Applicant might be entitled to relief only if the Supreme Court intended to hold, in *Penry II*, that all nullification instructions are constitutionally infirm in all cases in which the defendant offers any mitigation evidence. We do not read *Penry II* that broadly, and neither did the Fifth Circuit in its en banc decision in *Robertson v. Cockrell*.[6] If Robertson (whose mitigation "evidence-in quality and quantity-does not match Penry's")[7] was not entitled to relief under *Penry II*, then applicant, whose mitigation evidence does not rise to the level found in *Penry I*, is likewise not entitled to relief.

II.

A. *Penry I* mitigation evidence and the *Penry II* mitigation instruction issue.

In *Penry I*, the Supreme Court held that, although the Texas statutory special issues are a facially constitutional and

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[5] *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

[6] *Robertson*, 325 F.3d at 249-58.

[7] 325 F.3d at 244.

sufficient framework, those special issues may sometimes be insufficient to protect a defendant's right to have the jury consider and give effect to certain types of mitigating evidence.[8] Penry's mitigation evidence was that he had suffered severe childhood abuse and that he was mentally retarded. With evidence of this nature and severity, the special punishment issues might be insufficient in two ways.

First, Penry's evidence showed that, as a consequence of these two severe problems, he had a diminished ability "to control his impulses or to evaluate the consequences of his conduct."[9] The severity of Penry's impairment suggested a possible lack of full moral culpability, but the Supreme Court reasoned that, without a definition of "deliberateness" in the first special issue which would encompass a diminished moral culpability, the jury might not believe it could give full mitigating effect to this evidence.[10]

Second, the type of mitigation evidence offered by Penry was a "two-edged sword"; while it diminished his personal moral culpability, it increased the likelihood that he would constitute a continuing threat to society under the "future dangerousness" special issue.[11] Precisely the same evidence that made Penry potentially less morally aware and less culpable made him considerably more dangerous to others. The Supreme Court concluded that Penry had a constitutional right to jury instructions that would provide a vehicle for the jury to express its "reasoned moral response" to his double-edged mitigation evidence and to decline to impose the death penalty if it believed Penry's moral culpability was less because he had suffered from severe childhood abuse and mental retardation.[12] Because the bare-bones jury instruc-

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[8] *Penry I*, 492 U.S. at 315-37, 328, 109 S.Ct. 2934.
[9] *Id.* at 322.
[10] *Id.* at 323.
[11] *Id.* at 324.
[12] Id. at 328. FN 13. Id.

tions did not provide a sufficient vehicle for the jury, the Supreme Court reversed Penry's death sentence and remanded the case for a new punishment trial.[13]

The 1989 decision in *Penry I* created grave difficulties for Texas trial courts in capital murder cases. As the Fifth Circuit noted, trial courts:

> could not craft entirely new jury interrogatories, as the precise questions had been written by the state legislature. Nor could they suspend the trials in anticipation of legislative remediation, as the legislature would not meet again until 1991 and its reaction was unknown. Hoping to provide timely and Penry-compliant trials, the courts generally chose to cure the perceived deficiencies in the jury interrogatories by issuing, when appropriate, the supplemental instruction described above. This the Texas courts did from the pronouncement of *Penry I* to September 1, 1991, when the amended statute went into effect.[14]

Penry himself was retried during this legislative interregnum. And the trial judge gave the jury supplemental "nullification" instructions.[15] Once again, the Supreme Court reversed

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[13] *Id.*

[14] *Robertson*, 325 F.3d at 248-49.

[15] Those instructions were: You are instructed that when you deliberate on the question posed in the special issues, you may consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence,

Penry's death sentence, holding that the supplemental instructions still failed to give the jury an adequate vehicle by which they could consider and give effect to Penry's mitigation evidence of severe childhood abuse and mental retardation.[16] Furthermore, the Court held that the structure of the supplemental instruction, telling the jury to change its answer to one of the special-issue questions from a truthful "Yes" to an untruthful "No" simply to avoid imposing the death penalty, forced conscientious jurors to violate their oath to answer the questions truthfully.[17] Penry's death sentence was again reversed and the case returned for a third punishment trial.

Significantly, however, the Supreme Court did not state, in either *Penry I* or *Penry II*, that the Texas special-issue scheme was an insufficient vehicle for all mitigation evidence, or that all supplemental nullification instructions were necessarily unconstitutional vehicles for a jury's consideration of mitigating evidence.

B. The two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.

The first question before this Court is whether the two special issues given in this case provided a sufficient vehicle for the jury to give effect to applicant's mitigating evidence of a troubled childhood and of his somewhat limited mental ability. Given the quantity and quality of that evidence, we conclude that they did.

First, applicant offered evidence of his limited mental capacity. Applicant's mother testified that applicant was "a slow learner" in school. He had an I.Q. of 78 and possible

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is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues. See *Penry II*, 532 U.S. at 790, 121 S.Ct. 1910.

[16] *Id.* at 797, 121 S.Ct. 1910.

[17] *Id.* at 798-801, 121 S.Ct. 1910.

organic learning disabilities. Applicant attended special-education classes and his behavior was often noted as "exemplary," but he dropped out of school in the ninth grade at the age of eighteen. He committed this capital murder at the age of nineteen. This is evidence of below-average educational abilities and attainment, but it does not reflect even mild mental retardation, nor does it qualify as a severe handicap.

Second, applicant offered evidence of his difficult family background. His father had been in prison for robbery, was involved with a motorcycle gang, consorted with other women, used alcohol and drugs, and stole from his own family. This situation upset applicant. Because the family did not have a lot of money, applicant began looking for work as a young teen-ager. According to defense witnesses, applicant suffered because of his father's thefts from the family and from a lack of money in the home. This evidence sets out a less-than-ideal family background. But, like Robertson, whose natural father was an abusive alcoholic, applicant does not—with his unfortunately not-atypical evidence of an adverse childhood—raise a *Penry* issue.[18] While it may be of some mitigating value, it is not a "severe" handicap under *Penry I*.

Penry I does not require a special mitigation instruction, apart from the two statutory special issues, for any and all mitigating evidence, regardless of its strength, quantity or quality. For more than ten years, the Fifth Circuit has drawn the line between Penry and non-Penry mitigation evidence under the test of whether the defendant's criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own."[19]

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[18] See *Robertson*, 325 F.3d at 245,252-53.

[19] *Id.* at 251 (quoting Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir.1992) (en banc), aff'd, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993)). The Supreme Court granted certiorari in *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir.2002), cert granted sub nom. *Tennard v. Dretke*, — U.

This test takes into account the four principles set out by the Supreme Court in Penry: voluntariness, permanence, severity, and attribution.[20] If a disability is acquired involuntarily,[21] is of a permanent rather than transient nature,[22] is severe in *414 its impact upon the person,[23] [FN23] and is at least a partial cause or explanation of the criminal act,[24] then a

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S. — (2004) (No. 02-10038), to address whether the Court's reasoning in *Penry II* applies when evidence is admitted that the defendant is mentally "slow," but the capital crime cannot be attributed to that mental slowness. The disposition of that case, however, is not dispositive of applicant's claim. First, we do not read *Penry II* to expand upon the nature and scope of evidence that requires any additions to, or modification of, the pre-1991 Texas special issue scheme. See Robertson, 325 F.3d at 255-57. Second, applicant's mitigation evidence is more akin to that in *Robertson* than the mentally-slow evidence in *Tennard.* In other words, applicant's mitigating evidence did not show a severe handicap, much less a "uniquely" severe one.

[20] *Robertson,* 325 F.3d at 251.

[21] Thus, voluntary drug abuse, for example, does not qualify as constitutionally significant Penry evidence which requires a vehicle outside the scope of the statutory special issues. *See Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir.1992).

[22] Youth, although it may be mitigating in a particular case, is not a permanent disability; those who survive it will outgrow it. Thus, a jury does not normally need any additional instructional vehicle, beyond the statutory special issues, to consider youth as a mitigating factor. See Graham, 950 F.2d at 1014.

[23] For example, dyslexia and an unfortunate childhood are not so severe that they require any additional instructional vehicle under *Penry I.* See *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir.1994); Barnard, 958 F.2d at 639. On the other hand, a defendant who suffers from chronic paranoid schizophrenia does suffer a severe mental condition that might very well contribute to his criminal actions. See *Bigby v. Cockrell*, 340 F.3d 259, 273 (5th Cir.2003).

[24] For example, childhood abuse might cause demonstrable psychological effects upon a person and the capital offense act might be attributable to, or at least related to those specific psychological effects. See Madden, 18 F.3d at 308. See generally, Robertson, 325 F.3d at 252-53. *Compare Blue v. Cockrell*, 298 F.3d 318, 321-22 (5th Cir.2002) (parental abandonment, physical and sexual abuse, schizophrenia, brain injury, and resulting

defendant is entitled to a vehicle by which to give effect to that evidence—either supplementary instructions or a special mitigation issue.

Here, applicant merely argues that he presented "significant mitigating evidence that was virtually indistinguishable from Penry's and thus undeniably beyond the scope of the special issues." This evidence, however, is not qualitatively or quantitatively similar to that offered by Penry.[25] A "slow learner" is not, *ipso facto*, mentally retarded. A person who attends special-education classes does not, by virtue of that fact alone, suffer a severe disability. A person who drops out of school in the ninth grade is not necessarily the victim of a permanent disability. Similarly, one who has a disadvantaged background or a difficult childhood is not necessarily the victim of a severe and permanent disability. Furthermore, applicant fails to explain how or why this evidence affected his ability to control or evaluate his conduct. Undoubtedly, the vast majority of Americans have suffered some difficulties, disadvantages, or dire disappointments in life. Generally, people are able to survive, surmount, and learn from those negative experiences.

Moreover, applicant fails to show how being a slow learner and having been burdened by a feckless father impacted his later behavior or criminal conduct.[26] Applicant offered no

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poor impulse control satisfied claim for specialized Penry mitigation instruction).

[25] In *Penry*, for example, the defendant had been diagnosed with organic brain damage, possibly caused at birth or by beatings and multiple brain injuries at an early age. Penry offered expert testimony that spoke of the unique character of the severe abuse he suffered, his limited cognitive faculties, and his inability to learn from his mistakes. 492 U. S. at 309-10, 109 S.Ct. 2934.

[26] See *Barnard*, 958 F.2d at 634 (defendant's childhood experiences did not support Penry claim in the absence of evidence that those experiences led to any mental impairment or psychological disability linked to later criminal conduct).

evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder. Although we need not decide whether *Penry* requires a defendant to show that the crime is directly "attributable" to the severe handicap, *Penry* surely stands for the proposition that there must be at least a logical, reasonable evidentiary relationship established between the disability and the defendant's criminal conduct or his moral blameworthiness. Applicant has failed to establish any such evidentiary link.

Furthermore, applicant has failed to show that any mitigating quality of his family background and mental-limitations evidence could not be fully encompassed by the two statutory special issues. Applicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder and both his learning disability and troubled background were relevant to whether he would constitute a future danger to society. In *Penry*, the evidence supported an inference that the defendant was unable to learn from his mistakes as a result of his low I.Q., brain impairments, and severe childhood abuse. Thus, he was more likely to be a future danger because of his permanent disabilities. Here, the evidence shows the reverse: despite applicant's limitations and difficulties, his behavior in school was often "exemplary." There is no evidence that applicant was unable to learn from experience or unable to control his conduct, with or without his disabilities.[27] Applicant argues that:

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[27] *See, e.g., Graham*, 506 U.S. 461, 475-76, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (jury could have concluded from evidence of defendant's background that robbery-murder was an aberration and that he would not pose a future danger); *Davis v. Scott*, 51 F.3d 457, 464 (5th Cir.1995) (when defendant's difficult childhood background evidence did not demonstrate that he was unable to learn from his mistakes, but rather that he responded positively to a structured environment, second special issue provided sufficient vehicle for jury's consideration of mitigation evidence). In *Davis*, as in the present case, the evidence showed that the defendant was in special-education classes and suffered from a learning

> Evidence of Mr. Smith's troubled family life was simply beyond the scope of the first special issue (deliberateness) to the extent that the jury believed both that Mr. Smith acted deliberately and that his abusive background justified a sentence less than death. The same evidence worked only to his detriment on the second special issue (future dangerousness), because the jury could have concluded that an individual raised in an unstable and abusive environment would learn violence and be more likely to continue being violent as an adult. Thus, the second special issue did not allow the jury to use Mr. Smith's family life as a mitigating factor. Similarly, the fact that Mr. Smith is a slow learner, with a learning disability and speech handicap, would have no bearing on the first special issue except perhaps to hurt him and, under the circumstances, would only contribute to a "Yes" answer under the special issue.

But this is an argument that could be made about any specific piece of evidence—youth, old age, alcoholism, drug abuse, high intelligence, limited intelligence, poverty, disease, psychological impairments, and so forth. Conclusory assumptions and arguments are not sufficient to make out a Penry violation. One must first sort out the Penry "double-edged disability" mitigation evidence which cannot be given full effect under the statutory special issues from other, non-Penry mitigation evidence which can be given full effect under the special issues.

Therefore, we conclude that a defendant first must make a *prima facie* showing of a severe and permanent handicap, not

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disability. Nonetheless, the evidence also showed that Davis was a "tenderhearted, a very kind young man . . . cooperative . . . very creative, very calm, anxious to please." *Id.* at 465. Based upon that evidence, Davis's jury was not "compelled" to answer the second special issue affirmatively; it could give mitigating effect to the evidence presented without any special Penry vehicle. *Id.* The same is true in this case.

of his own making, which is at least related to the commission of the capital offense[28]. Second, the defendant must show that this disability evidence was effectively beyond the reach of the two special issues. Applicant has made neither showing. We conclude that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.

C. The "nullification instruction" in this case was a sufficient vehicle to accord full weight to applicant's mitigation evidence.

Applicant also asserts that the extra-statutory mitigation instructions in this case were "virtually identical" to those given in *Penry II*. They are not. Only if the Supreme Court intended to say in *Penry II* that any and all nullification instructions are unconstitutional on their face are these instructions infirm.

In this case, unlike that in *Penry II*, the trial court's special instruction explicitly told the jury that it "shall consider any evidence, which, in your opinion, is mitigating."[29] It defined mitigating evidence as "evidence that reduces the defendant's personal or moral culpability or blameworthiness." It expressly informed the jury that "[y]ou may hear evidence which, in your judgment, has no relationship to any of the Special Issues. But if you find such evidence is mitigating under these instructions, you shall consider it" and "you shall answer at least one of the Special Issues 'No' "if you believe "that the death penalty should not be imposed due to the mitigating evidence presented to you."[30] Furthermore, the trial court instructed the jury that the State "must prove beyond a reasonable doubt that the death sentence should be

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[28] See *Robertson*, 325 F.3d at 251.

[29] Emphasis added. Compare supra, note 15 (instructions in Penry II).

[30] Emphasis added.

imposed despite the mitigating evidence, if any, admitted before you."

Thus, the present instruction not only told the jury that it "shall" consider all mitigating evidence, even evidence unrelated to the special issues, it also told the jury how to answer the special issues to give effect to that mitigation evidence.[31] Here, the jury did not have to read anything into the mitigation instruction or decide which instruction should control over the other one.[32] These instructions expressly authorized and required the jury to answer "No" to at least one of the special issues if it believed that the death penalty was not warranted because of the mitigating circumstances. The trial court's instructions clearly informed the jury that mitigation evidence "trumped" the special issues.[33]

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[31] In *Penry II*, the Supreme Court stated that "[a] clearly drafted catchall instruction on mitigating evidence also might have complied with *Penry I*." *532 U.S. at 803, 121 S.Ct. 1910*. Justice O'Connor then noted with approval that the Texas Legislature had, at its earliest opportunity, enacted a statutory third special issue which became effective September 1, 1991. That "nullification" special issue trumps the truthful answers to the first two special issues by means of the statutorily authorized third question. At the time of applicant's trial, however, trial courts did not have authority to create and submit this special "nullification" mitigation issue. However, the supplemental instruction given in this case came as close as possible to achieving the same purpose as the third special issue without the trial judge crossing the boundary of making up new special issues without legislative authorization.

[32] Compare *Penry II*, 532 U.S. at 797-98, 121 S.Ct. 1910 (one reading of instruction "told jurors to take *Penry's* mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I*").

[33] The instruction did not instruct the jury to violate their oaths or answer either of the special issues "falsely," but rather to answer the special issues honestly in light of both the question itself and the defendant's mitigating evidence which, as the trial court clearly informed the jury, might or might not have direct relevance to those specific issues. This wording of this specific instruction, unlike that in *Penry II*, did not

This supplemental instruction, although dissimilar to that in *Penry II*, is similar to that in Robertson.[34] We agree with the Fifth Circuit's en banc conclusion that this supplemental instruction provided "a more capacious vehicle than was constitutionally warranted."[35] We also agree with that court's determination that:

> the supplemental instruction did not render the jury charge potentially contradictory. The jury was not forced into the position—as they were in *Penry II*—of falsely answering "no" to the questions of deliberateness or future dangerousness. The most that one could say is that the supplemental instruction was redundant in this case.[36]

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insert "an element of capriciousness" into the sentencing decision, "making the jurors' power to avoid the death penalty dependent on their willingness to elevate the supplemental instruction over the verdict form instructions." Compare *Penry II*, 532 U.S. at 800, 121 S.Ct. 1910. Instead, the supplemental instructions guided the jurors in answering the special issues by requiring them to consider all mitigating evidence of whatever sort and requiring them to give effect to that evidence by truthfully answering at least one of the special issues with a "No" if they determined that the State had failed to prove, beyond a reasonable doubt, that a death sentence should be imposed despite the mitigating evidence. See *Penry II*, 532 U.S. at 806-07, 121 S.Ct. 1910 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J. dissenting). We have confidence that jurors are capable of reading and understanding these particular supplemental instructions in a commonsense manner. This instruction is, in fact, more favorable to the defendant than the third, statutory "nullification" special issue that *Penry II* noted with approval because it explicitly put a burden on the State to prove, beyond a reasonable doubt, that the death penalty should be imposed despite any mitigating evidence. A reasonable jury would not likely be confused by these particular instructions.

[34] *Robertson*, 325 F.3d at 245 n.

[35] *Id.* at 258.

[36] *Id.* Compare Bigby v. Cockrell, 340 F.3d 259, 275-77 (5th Cir.2003) (supplemental instruction that was "almost identical" to that in *Penry II* suffered same constitutional infirmity as in that case).

Therefore, we conclude, as the Fifth Circuit did in *Robertson*, that the supplemental instruction in this case was not error of any sort.[37]

Because we find no constitutional infirmity under either *Penry I* or *Penry II* in this case, we agree with the trial court's recommendation that applicant's request for habeas corpus relief be denied. We therefore deny relief.

HERVEY, *J.*, filed a concurring opinion in which KEASLER, *J.*, joined.

HOLCOMB, J., filed a concurring opinion in which PRICE, J., joined.

[37] Robertson, 325 F.3d at 258.

HERVEY, *J.*, filed a concurring opinion in which KEASLER, *J.*, joined.

I join Parts II.A. and II.B. of the Court's opinion. We filed and set for submission applicant's post-conviction claim that the special issues and the "nullification" mitigating evidence instruction submitted at the punishment phase of his 1991 capital murder trial did not provide the jury with a vehicle to give effect to mitigating evidence in violation of the Eighth Amendment and the United States Supreme Court's decision in Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

I.

The State suggests that this Court might not have jurisdiction to consider the merits of this claim because it is raised in a successive habeas application. This Court has jurisdiction to consider the merits of this claim. See Article 11.071, § 4A(f), Tex.Code Crim.Proc.; Ex parte *Smith*, 977 S.W.2d 610, 611 (Tex.Cr.App.1998).

II.

In *Penry II*, the Supreme Court decided that the special issues and a "nullification" mitigating evidence instruction submitted at Penry's resentencing hearing failed to provide Penry's jury with an adequate vehicle to give mitigating effect to constitutionally relevant mitigating evidence of Penry's severe childhood abuse and mental retardation that tended to explain Penry's commission of the offense. See *Penry II*, 121 S.Ct. at 1915, 1921-22; *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2947-49, 106 L.Ed.2d 256 (1989) (*Penry I*). The Court reasoned that: (1) the special issues provided the jury with no vehicle to give mitigating effect to this evidence, and (2) the "nullification" instruction was an "inadequate vehicle" to give mitigating effect to this evidence because it was confusing and it contradicted the special issues making it "logically and ethically impossible for a juror to

follow both sets of instructions." See *Penry II*, 121 S.Ct. at 1915, 1921-22; *Penry I*, 109 S.Ct. at 2947, 2949. The "less than artful" portion of the "nullification" instruction which the Supreme Court found objectionable stated:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry II, 121 S.Ct. at 1921.

III.

In this case, applicant was convicted of murdering a former female coworker during a robbery of a Taco Bell restaurant. Applicant tortured the terrified young victim before brutally killing her. Consistent with the evidence presented at applicant's 1991 trial, the prosecution provided the following summary of its theory of the case to the jury at applicant's 1991 trial.

> . . . [Applicant] goes on back to where [the victim] is in that back office, and you heard from the witnesses about how they saw him pistol whipping her about her head. "What's the combination, Jennifer, to open the safe?" "I can't. I don't know it. I don't know it. I can't open the safe. I can't. I don't know it." You know that he proceeded to pistol whip her about the head. You know after that that he shot her in the back, right back here behind the left shoulder bone, came out right underneath

her left breast, and what did she say? "God, please don't let me die." But that wasn't enough.

Is there any question about whether or not his conduct was deliberate? It wasn't enough to pistol whip her, and it wasn't enough to shoot her in the back with that gun. So, what is the next thing that he does? "Well, she's not dead yet, you see. She's still alive. She still might give me the combination to the safe," or open it up for him. So, what does he do? He goes back into the kitchen area, grabs a butcher knife—and you saw that knife—and he comes back in there, and I submit to you, and you heard from the testimony of Dr. Davis, the medical examiner—what did he tell you? Let's talk about how he went about killing her. Let's talk about it. He said the cause of death was multiple stab wounds and the gunshot wound to the back. He told you, and I submit to you--he told you he can't tell you the order that those wounds occurred, but I submit to you that it went something like this: Pistol whipped her, she still wouldn't comply, then he shot her in the back. She still is saying, "I don't know the combination of the safe." He gets the butcher knife. He comes back--and Dr. Davis told you about those little cluster wounds. "Tell me the combination, Jennifer." "I don't know it." Nick, nick, nick, nick, right underneath her left breast. "Give me the combination, Jennifer." "I can't." Then I submit to you that he proceeded to stab her in the thigh and in the abdomen and in the head, and you know about that fatal wound, that gaping slash, on the side of her neck.

Applicant also presented what he claimed was mitigating evidence at his 1991 trial. Applicant's writ (with citations to the 1991 trial record omitted) sets out the following evidence which applicant claims was mitigating.

During trial, Applicant presented mitigating evidence. Applicant showed Sandier exaggerated the extent of his injuries

incurred during the bat incident [in which applicant assaulted Sandier with a baseball bat]. Applicant showed he was docile when confronted and arrested by the police. Although Applicant's teachers and principals found Applicant was disruptive and disrespectful, Applicant never got into any trouble so serious that required the intervention of the Youth Division of the Dallas Police Department at Carter High School. Similarly, Applicant never found himself in the sort of trouble that required the intervention of the Youth Action Center, which was precisely where Applicant would have gone if he had been involved in anything that was beyond the scope of the teachers and principals to handle effectively. Applicant's pastor thought highly of him but acknowledged, realistically, that some of Applicant's problems could be attributed to the fact he was a teenager and to the fact Applicant's father had seriously destabilized Applicant's family. Applicant showed he was medically diagnosed as a slow learner. Applicant showed he was learning disabled and speech handicapped. Applicant had an IQ of 78. Applicant showed that, notwithstanding the fact he was failing in special education, he was promoted. Applicant showed he was not a disruptive force when in a prison environment. Applicant showed that his friends, family, and neighbors liked and respected him for his loyalty, thoughtfulness, generosity, and willingness to assume responsibility. The offense for which Applicant was convicted is inconsistent with his history. Additionally, the violence and brutality of the offense are inconsistent with Applicant's past behavior.[1]

The record from the punishment phase of applicant's 1991 trial reflects that the "deliberateness" and "future dangerousness" special issues were submitted to the jury along with

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[1] The 1991 trial record further indicates that applicant presented evidence that applicant's father was a drug addict and neglected applicant. The father also stole from the family to support his drug habit and this upset applicant. The father eventually left applicant's home.

a "nullification" mitigating evidence instruction which allowed the jury to give effect to applicant's mitigating evidence "beyond the scope of the special issues" by authorizing a "no" answer to one of the special issues. This instruction provided:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the special issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the special issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the special issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death

sentence should be imposed despite mitigating evidence, if any, admitted before you.

The 1991 trial record further reflects that, during voir dire, this instruction and how it operated was very carefully explained to each veniremember who sat on appellant's jury and that these veniremembers stated that they understood it. For example, Juror # 7 stated:

> Q. [PROSECUTION]: I want to throw another wrinkle in on these [special issues]. Assuming that you hear evidence that convinces you [the special issues] should be answered yes, okay, the law is going to give you--the Court would give you a further instruction, and it has to do with what's called mitigating evidence. Mitigating evidence has--means, basically, some type of evidence that would lessen a person's responsibility for his action, okay? For example, let's say that they are retarded or they have a drug or alcohol problem or they have been abused as a child.
>
> Those factors might be considered by a juror to be mitigating. They might decide, "Well, you know, because of what I've heard, I know the guy did the crime, and I know these questions technically are answered yes, you know, he did it deliberately and there's a future threat, but because was what I've heard, this mitigating evidence, I don't feel the person should die for what he did. In my heart, I don't think he should die because of these factors."
>
> The judge is going to tell you if that's the case, you can go back and change one of these answers to no to give effect to that feeling. The reason for that is there's nothing in these questions that you can really factor that in. There's nothing in there to say anything about his mental state or whether or not he had a problem growing up.

Now, if that evidence is raised, you're going to have that consideration—that option to change one of these answers. And, you know, what's mitigating to one juror may not be to another. You all are going to have to decide, if you hear it, if you think that's enough to prevent the death sentence. One juror—you may hear that the guy was on drugs when he committed the offense. If you hear something like that, you can see how one juror might say, "Well, I can see how that kind of excuses, kind of, maybe. If he hadn't been doing drugs, he wouldn't have done this, and because of that, I don't think he needs to die." Juror, you know, number two might look at you and say, "Well, I think that's even worse. He shouldn't have even done the drugs to start with. That makes it even worse that he's doing drugs and killing people."

The point I'm getting at is that you know what's mitigating, you all are going to have to decide that, and what's mitigating to one person may not be to another. That phrase, that's about as big a definition as you're going to get about that. You'll have to decide that.

So if you hear that type of evidence, you're going to be faced with a couple of questions. One is, first of all, is it mitigating? And secondly, is it mitigating to the point where you don't believe the death sentence should be assessed? If that's the case, you're going to have an option to change an answer.

Do you feel that you could do that if you heard the proper facts?

A. [JUROR # 7]: Uh-huh.

. . .

Q. [DEFENSE]: [Juror # 7, the prosecutor] has talked to you, also, and told you that this scheme of special issues

is kind of skewed because a jury can still believe that an act was done deliberately and that he could be a future threat to society but still believe that he should die. It could be his role in the murder. It could be just a fairness issue in terms of other people involved, what has happened to them.

It could be any number of things, but a juror could, in essence, just say, "I don't think he should die." Then if all you have are those two questions, and if you honestly believe the answers were yes, then the person would be killed even though the jury still felt he should live.

And the legislature hasn't quite caught up to the law. The Supreme Court has recognized that, and, ideally, there should probably be a fourth special issue saying regardless of answers one through three, do you feel there is mitigating evidence such that it should save his life or some phrase like that.

I probably wouldn't be a very good legislator since I can't draft it, but that's not the way the law is now. That's not the way the statute is, but the judge would give you in the court's charge an instruction that says if you find there is mitigating evidence, and if you believe that that should save him from the death penalty, then you shall—shall is the big legal word for must—shall change one of the answers to no so that you can give effect to your heartfelt beliefs.

In other words, if there's two yes answers, the judge has to sentence him to death. If there is one no, he gets a life sentence. Those are the only two options. And so the law has said that the only way the judge could give effect to the jury's true belief is if one answer was no.

Do you feel that if you heard mitigating evidence and if you felt that regardless of whether he would be a threat in the future and regardless of whether you felt the act

was done deliberately, if you felt that he should not die, could you go back and, in essence, erase one of the yeses and put no in order to give effect and meaning to your true feelings?

A. [JUROR # 7]: Yes.
Q. [DEFENSE]: I mean, that's what the Court would tell you all to do, that you're allowed to do, and if you felt he should live, then the Court says you shall change one of the answers. In other words, you're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules.[2]

Do you have any problem with that, ma'am?

A. [JUROR # 7]: Huh-uh.

Q. [DEFENSE]: Do you understand why that particular charge would be in there?

A. [JUROR # 7]: Yes.

Juror # 10 similarly stated.

Q. [DEFENSE]:—and if it didn't make sense, you could discard it? Okay. The law—kind of getting back to those two questions, it used to be that there were no questions and the jury has—like I was kind of saying or trying to say earlier, they had a wide discretion on what to do. That before these special issues came into being, juries would just decide whether it should be life or death, 15 years probation, whatever. Because of the way they're structured, two "yes" answers equals death, and there's no secret. We're not, you know, trying to hide the law or anything. It's all up front. It's come to the court's attention, primarily, because the legislature is a little bit

[2] But *see Penry II*, 121 S.Ct. at 1922 (claiming that this could have

behind the court's decisions that this format may not be entirely fair because jurors could believe that the person—there's a probability that they would be a continuing threat to society, but still believe that the person shouldn't die. In other words, through the whole ball of wax, through the trial and the guilt-innocence and punishment phase, they could just believe that under this fact situation with this person, he should die, and by just answering mechanically "yes" and "yes," if that's a true answer, you could never save the person. Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence—that's really anything. It's stuff you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances—if you felt that he shouldn't die, then you're authorized—actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from "yes" to "no" if you feel that he should not die.

Do you have any problem with that?

A. [JUROR # 10]: No.
Q. [DEFENSE]: Okay. I mean, it's not like you're cheating or lying or doing something—
A. [JUROR # 10]: No.
Q. [DEFENSE]: —to change it. That's what the Court would tell you to do to give effect to your heartfelt belief that he should live, okay? Also these two special issues are kind of designed to be high hurdles. In other words, the law is trying to decide of all the people that commit capital murders, murders in the course of robbery, why should some live and some die. They're trying, I think, to remove the—they called it, I think, arbitrary and freakish dispositions or impositions of the death sentence or capriciously done, something like that, that there's no rhyme or reason to it. I think what the

> legislature is trying to do is set certain barriers or hurdles for the State to get over before a person should be killed, and they're supposed to be high hurdles. In other words, the standard is beyond a reasonable doubt. They're looking for a deliberate act. They're looking for future dangerousness. On top of all that, they're looking for no mitigation to change the answers.
>
> Do you have any problem with the way those special issues are designed and how you could answer them if you felt he should live instead of die?
>
> A. [JUROR # 10]: No.[3]

During closing jury arguments at the punishment phase, applicant reminded the jury of the procedure that was carefully explained to them during voir dire.

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you that the State has a burden--that if you think that he should not die, you are to put "no" in one of the spaces, that the State has the burden of proof beyond a reasonable doubt to convince each and everyone of you that he should still die.[4]

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[3] The Supreme Court discounted similar voir dire proceedings in *Penry II* by explaining that the jurors (at least those in that case) "surely" had "a distant and convoluted memory" of those voir dire proceedings by the time they began their punishment phase deliberations. See *Penry II*, 121 S.Ct. at 1922-23.

[4] The Supreme Court discounted a similar argument made by the defense in *Penry II* by explaining that this "only reminded the jurors that they had to answer the special issues dis honestly in order to give effect to Penry's mitigating evidence." *See Penry II*, 121 S.Ct. at 1923 (emphasis in original).

IV.

I would decide that applicant procedurally defaulted the claim that he makes for the first time in this habeas proceeding. It must be kept in mind that *Penry I* had been decided at the time of applicant's 1991 trial and that *Penry II* did not break new ground or announce any new rules because it decided only that the jury instructions at Penry's retrial did not comply with *Penry I*'s mandate. See *Penry II*, 121 S.Ct. at 1915, 1924; *Robertson v. Cockrell*, 325 F.3d 243, 255-57 (5th Cir.), *cert. denied*, 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003) (*Penry II* only reiterated the holding of *Penry I*).

The record reflects that applicant did not object to the "nullification" instruction at his 1991 trial. *Compare Penry II*, 121 S.Ct. at 1923 (stating that Penry offered definitions to the charge that the trial court refused to give). On the contrary, a review of the 1991 trial record (particularly the individual voir dire) indicates that applicant was satisfied with the "nullification" instruction. Almost 13 years later but before the Supreme Court decided *Penry II*, applicant filed this habeas application in which he claimed for the first time that the conflicting instructions in the charge precluded the jury from giving effect to mitigating evidence. Echoing the Supreme Court's later decision in *Penry II*, applicant argued in support of this claim that it "confounds common sense to suggest jurors—who are sworn to tell the truth—would ever understand that they were authorized to answer [the special issues] falsely, and yet this is precisely what the 'nullification' instruction invited the jury to do."

Applicant presents no reason why he could not have raised this claim at his 1991 trial. Applicant also presents no reason why he could not have raised this claim on direct appeal. On direct appeal, applicant claimed only that we should have reconsidered our post-*Penry I* precedents because they had "unconstitutionally narrowed the sentencer's discretion to

consider relevant mitigating evidence." Applicant, of course, did not raise this claim at his 1991 trial.

One might suggest that applicant could not have raised the claim that he raised in his habeas application before the Supreme Court decided *Penry II*. But, applicant did raise this claim in his habeas application before the Supreme Court decided *Penry II*. There is no reason why he could not have raised it 13 years ago. Applicant, therefore, procedurally defaulted the claim that he raises for the first time in this habeas corpus proceeding.

V.

Notwithstanding the foregoing, the claim that applicant raises for the first time in this habeas corpus proceeding lacks substantive merit. In addressing applicant's claim that his jury had no vehicle to give effect to his mitigating evidence, it is helpful to briefly summarize our *post-Penry I* mitigating evidence jurisprudence. The Supreme Court in Jurek and several other cases has upheld the constitutionality of Texas' special issues framework because these special issues generally provide a jury with a vehicle to meaningfully give effect to relevant mitigating evidence. *See, e.g., Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976); *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 901, 122 L.Ed.2d 260 (1993). In *Penry I*, the Supreme Court decided only that this framework was unconstitutionally applied to Penry because it did not provide the jury with a vehicle to give mitigating effect to Penry's evidence of mental retardation and severe childhood abuse that tended to explain his commission of the offense. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2947-49, 106 L.Ed.2d 256 (1989). We were assured, however, that *Penry I* did not "effec[t] a sea change in [the Supreme Court's] view of the constitutionality of the former Texas death penalty statute." *See Graham*, 113 S.Ct. at 901.

Some members of this Court believed that *Penry I* required in every case another jury instruction to provide a jury with a vehicle to give effect to any mitigating evidence "beyond the scope of the special issues." Realizing that this view would have effected a "sea change" in the constitutionality of the "former Texas death penalty statute," this Court's post-*Penry I* precedents narrowly read *Penry I* and decided in numerous cases that the special issues provided a jury with a vehicle to meaningfully give effect to mitigating evidence such as that presented in this case.[5]

This Court's post-*Penry I* precedents also decided that a defendant had to establish a "nexus" between his claimed mitigating evidence and the offense (that tended to excuse the defendant's commission of the offense) before the defendant was entitled to another jury instruction to give effect to this evidence beyond the scope of the special issues. See Footnote 6. This "nexus" requirement was based on *Penry I*'s definition of constitutionally relevant mitigating evidence. See *Penry I*, 109 S.Ct. at 2947; *Richardson v. State*, 901 S.W.2d 941, 942 (Tex.Cr.App.1994); *Lackey*, 819 S.W.2d at 134-35.[6]

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[5] *See Lackey v. State*, 819 S.W.2d 111, 128-36 (Tex.Cr.App.1989); *Mines v. State*, 888 S.W.2d 816, 818-21 (Tex.Cr.App.1994) (Baird, J., concurring) and cases cited.

[6] In Richardson, we noted that *Penry I* states that a defendant presents relevant mitigating evidence when he presents evidence that his criminal acts "are attributable to a disadvantaged background, or to emotional and mental problems." *See Richardson*, 901 S.W.2d at 942; *Lackey*, 819 S.W.2d at 134-35. *Penry I*, 109 S.Ct. at 2947 (internal quotes omitted), literally states:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Some claimed that this was a "crabbed interpretation" of *Penry I*.[7] As it turned out, the Supreme Court upheld this "crabbed interpretation" of *Penry I* in *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) which decided that the Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant" and that *Penry I* is satisfied as long as relevant mitigating evidence is within "the effective reach of the sentencer." *See Johnson*, 113 S.Ct. at 2669.[8] When relevant mitigating evidence is within "the effective reach of the sentencer," no separate jury instruction is required to provide a jury with a vehicle to give effect to this evidence beyond the scope of the special issues even if there is a "nexus" between this evidence and the offense. *See Johnson*, 113 S.Ct. at 2669; Richardson, 901 S.W.2d at 941-42; *Richardson*, 886 S.W.2d at 771-76. A separate jury instruction is required only when the special issues place constitutionally relevant mitigating evidence completely beyond "the effective reach of the sentencer." See Johnson, 113 S.Ct. at 2669; *see also Penry II*, 121 S.Ct. at 1922 (reasonable likelihood that "nullification" instruction prevented jury from considering constitutionally relevant mitigating evidence); *Penry I*, 109 S.Ct. at 2949 (reasonable likelihood that the special issues prevented the jury from considering constitutionally relevant mitigating evidence).

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[7] *See Richardson v. State*, 886 S.W.2d 769, 777-79 (Tex.Cr.App.1991) (Clinton, J., dissenting) (claiming that "essence of the Supreme Court's holding" in *Penry I* required that a "jury must be empowered to give mitigating evidence all the effect to which it is susceptible"); *see also Richardson*, 901 S.W.2d at 941-42 and at 942-43 (Clinton, J., dissenting).

[8] We note that *Penry II* cites to a dissenting opinion in *Johnson* followed by a parenthetical stating that a "sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances." See *Penry II*, 121 S.Ct. at 1920 citing Johnson, 113 S.Ct. at 2676 (O'Connor, dissenting) (emphasis in original). I do not understand this part of *Penry II* as having silently overruled *Johnson*.

Our post-*Penry I* precedents are also consistent with the Fifth Circuit's post-*Penry I* jurisprudence. See Robertson, 325 F.3d at 248-55. The Fifth Circuit has also concluded that *Penry II* did not disturb this post-*Penry I* jurisprudence. See Robertson, 325 F.3d at 255-57 (rejecting any suggestion that *Penry II* silently modified *Penry I* and encroached upon Jurek). With these comments in Section V. of this opinion, I join parts II.A. and II.B. of the Court's opinion.

VI.

With all of this in mind, it is clear that applicant's jury could have meaningfully given mitigating effect to any relevant mitigating evidence in answering the special issues. This Court would also have to ignore a significant number of its precedents as well as Fifth Circuit case law to hold otherwise.[9] The "nullification" mitigating evidence instruction at applicant's 1991 trial, therefore, provided applicant more than what he was constitutionally entitled to receive. *See Johnson*, 113 S.Ct. at 2669; *Robertson*, 325 F.3d at 257-58 ("nullification" instruction provided the defendant "with a more capacious vehicle than was constitutionally warranted").

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[9] *See, e.g., Mines*, 888 S.W.2d at 818-21 (Baird, J., concurring) and cases cited (evidence of brain damage, violent family background, growing up in poverty, voluntary intoxication, drug abuse, suicide attempt, lack of education, being a good and loving child, critical illness as a child, voluntary service, good character evidence, abusive childhood, remorse, general good character evidence, mental instability can be given mitigating effect when answering the special issues); *Lackey*, 819 S.W.2d at 128, 134 (evidence of "a low level of intelligence, shown by extremely substandard IQ test scores," poor school record, turbulent childhood and troubled relationship with father, and youth could be given mitigating effect when answering the special issues); Robertson, 325 F.3d at 249-51 (additional instructional vehicles not required for many different types of mitigating evidence, including but not limited to, subnormal intelligence, youth, troubled or abused childhood, intoxication, substance abuse, head injury, good character, mental illness, antisocial personality disorders, and dyslexia).

It has been suggested that applicant's "criminal conduct was in some way attributable to his unfortunate childhood experiences" which would have entitled him to a charge that provided the jury with a vehicle to give effect to this evidence beyond the scope of the special issues. Applicant was not entitled to such a charge because "there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." *See Johnson*, 113 S.Ct. at 2669; *Lackey*, 819 S.W.2d at 134 (evidence of defendant's "limited intellectual and mental capability, his problematic relationship with his father, physical abuse by his father, and his age at the time of the offense is relevant to a proper resolution of the concerns" of the future dangerousness special issue); *Robertson*, 325 F.3d at 253 (statutory special issues were adequate to allow jury to effectuate the mitigating potential of defendant's claim of childhood abuse because this evidence exhibited no "nexus to his brutal crimes").

Applicant's evidence of "unfortunate childhood experiences," like the evidence of the "ill effects of youth" in Johnson, could have been "readily comprehended as a mitigating factor in consideration of the [future dangerousness] special issue." *See Johnson*, 113 S.Ct. at 2669-70. In *Johnson*, 113 S.Ct. at 2669-70, the Court stated:

> That the jury had a meaningful basis to consider the relevant mitigating qualities of petitioner's youth is what distinguishes this case from [*Penry I*]. In [*Penry I*], there was expert medical testimony that the defendant was mentally retarded and that this condition prevented him from learning from experience. (Citation omitted). Although the evidence of the mental illness fell short of providing Penry a defense to prosecution for his crimes, the Court held that the second special issue did not allow the jury to give mitigating effect to this evidence. Penry's condition left him unable to learn from his

mistakes, and the Court reasoned that the only logical manner in which the evidence of his mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor. (Citation omitted). [*Penry I*] remains the law and must be given a fair reading. The evidence of petitioner's youth, however, falls outside [*Penry I*'s] ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue.

Petitioner does not contest that the evidence of youth could be given some effect under the second special issue. Instead, petitioner argues that the forward-looking perspective of the future dangerousness inquiry did not allow the jury to take account of how petitioner's youth bore upon his personal culpability for the murder he committed. According to petitioner, "[a] prediction of future behavior is not the same thing as an assessment of moral culpability for a crime already committed." (Citation omitted). Contrary to petitioner's suggestion, however, this forward-looking inquiry is not independent of an assessment of personal culpability. It is both logical and fair for the jury to make its determination of a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct. (Citation omitted). If any jurors believed that the transient qualities of petitioner's youth made him less culpable for the murder, there is no reasonable likelihood that those jurors would have deemed themselves foreclosed from considering that in evaluating petitioner's future dangerousness. It is true that Texas has structured consideration of the relevant qualities of petitioner's youth, but in so doing, the State still "allow[s] the jury to give effect to

> [this] mitigating evidence in making the sentencing decision." (Citation omitted). Although Texas might have provided other vehicles for consideration of petitioner's youth, no additional instruction beyond that given was required in order for the jury to be able to consider the mitigating qualities of youth presented to it.

VII.

It is unnecessary for the Court to state in Part II.C. of its opinion that, as a matter of federal constitutional law, the "nullification" instruction here was a sufficient vehicle to accord "full" weight to applicant's mitigation evidence. The Constitution does not require a vehicle to accord "full" weight to a defendant's mitigation evidence. See Johnson, 113 S.Ct. at 2669 (Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant"). In addition, the "nullification" instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond "the effective reach of the sentencer." See *Penry II*, 121 S.Ct. at 1915, 1921-22; Johnson, 113 S.Ct. at 2669. It is dispositive of applicant's federal constitutional claim in this case to simply decide that the special issues submitted at applicant's 1991 trial provided the jury with a vehicle to give constitutionally sufficient mitigating effect to applicant's mitigating evidence and that this evidence was within "the effective reach of the sentencer." *See id.*

VIII.

Finally, having decided that no federal constitutional violation occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable "nullification" instruction such as the one in this case. *But see Penry II*, 121 S.Ct. at 1922-23.

The record in this case clearly reflects that there was no reasonable likelihood that the jury applied the "nullification" instruction in a way that prevented it from considering and giving effect to constitutionally relevant mitigating evidence even beyond the scope of the special issues. Cf. *Penry II*, 121 S.Ct. at 1922 (federal constitutional issue is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant mitigating evidence). Even though it may not have done so as a matter of federal constitutional law, the "nullification" instruction did, as a matter of fact, provide the jury with a vehicle to accord "full" weight to applicant's mitigation evidence.

I concur in the Court's judgment to deny habeas corpus relief.

HOLCOMB, *J.*, filed a concurring opinion in which PRICE, *J.*, joined.

OPINION

I agree with the majority that the petitioner is not entitled to relief on habeas corpus. However, I do so only because I am compelled by the facts to agree with the concurrence that Smith procedurally defaulted the claim he now raises, that his nullification instruction was insufficient under *Penry II*,[1] precluding the jury from giving effect to his mitigating evidence. Smith did not object to the nullification instruction during his trial in 1991. An objection at that time would not have been futile because this Court had not yet addressed the issue. We addressed the issue in 1992 when we decided Fuller[2] and held that a nullification instruction was sufficient under *Penry I*. Thus, I concur with the result. However, I am concerned regarding the application of procedural default in cases in which the consequences are so dire and where the claim raised is meritorious.

I write to dissent to the majority's reasoning and resolution of Smith's claim on the merits. Under *Penry I*, a defendant is entitled to a supplemental instruction if there is mitigating evidence that is (1) relevant to the defendant's moral culpability for the offense and (2) beyond the scope of the special issues. The evidence Smith produced satisfied these two requirements. Therefore, he was entitled to a supplemental instruction to provide the jury with a vehicle to consider and give effect to that evidence. The nullification instruction provided to Smith's jury contained the same defects the Supreme Court identified in *Penry II*. Therefore, the jury was unconstitutionally precluded from considering and giving effect to Smith's mitigating evidence.

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[1] *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

[2] *Fuller v. State*, 829 S.W.2d 191, 209 (Tex.Crim.App.1992).

The majority errs in choosing to adopt what is essentially the Fifth Circuit's *Penry I* construct limiting the application of *Penry I*'s holding to cases in which the evidence demonstrate a uniquely severe permanent handicap. The majority also errs in finding Smith's nullification instruction to be sufficiently distinguishable from Penry's that Smith's nullification instruction would provide a sufficient vehicle under *Penry I*. Therefore, I dissent.

Penry I's Supplemental instruction requirement

In general, the Court in *Penry I* recognized that when a defendant presents mitigating evidence relevant to his personal moral culpability but not relevant to the special issues or relevant to the special issues only as an aggravating factor, the special issues alone would not allow the jury to give effect to the mitigating quality the evidence presented.[3] In that situation, the State must provide an additional vehicle to the jury so that the jury may consider and give effect to the evidence. Therefore, the defendant's mitigating evidence necessitates a *Penry I* instruction when: (1) the evidence is relevant to the defendant's moral culpability, and (2) the mitigating quality of such evidence cannot be given effect under the special issues alone.

Regarding the first requirement, with respect to *Penry I* claims, this Court has focused on whether the evidence demonstrated a nexus between the mitigating circumstance and the offense.[4] This nexus requirement is rooted in the follow-

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[3] *See Penry I*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256.

[4] *Goss v. State*, 826 S.W.2d 162 (Tex.Crim.App.1992). *See also Zimmerman v. State*, 881 S.W.2d 360 (Tex.Crim.App.1994); *Earhart v. State*, 877 S.W.2d 759 (Tex.Crim.App.1994); *Mines v. State*, 888 S.W.2d 816 (Tex.Crim.App.1994); *Satterwhite v. State*, 858 S.W.2d 412 (Tex. Crim. App.1993); *Muniz v. State*, 851 S.W.2d 238 (Tex.Crim. App.1993); *Richardson v. State*, 879 S.W.2d 874 (Tex.Crim.App.1993); *Richard v. State*, 842 S.W.2d 279 (Tex.Crim.App.1992); *Nobles v. State*, 843 S.W.2d 503 (Tex.Crim.App.1992); *Lackey v. State*, 819 S.W.2d 111 (Tex.

ing statement from Justice O'Connor's concurring opinion in California v. Brown[5] that was adopted by the majority of the Supreme Court in *Penry I*:[6]

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.[7]

This statement followed the Court's summary of its holding in Eddings[8] that "a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death."[9] Thus, the Supreme Court established the nexus requirement as the way to determine when evidence that might be considered mitigating is relevant to the defendant's moral culpability, and, thus also to whether the death penalty is appropriate for the defendant. While the Supreme Court has not used the term "nexus," this label encapsulates the Supreme Court's reasoning.

This Court has not previously interpreted *Penry I* to require the mitigating circumstance about which evidence is pre-

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Crim.App.1989), *opinion on motion for rehearing*, 816 S.W.2d 392 n. 10 (Tex.Crim.App.1991); *Gribble v. State*, 808 S.W.2d 65 (Tex. Crim.App.1990) (plurality opinion) (suggested requirement).

[5] *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

[6] *See Lackey*, 819 S.W.2d at 135 n. 10.

[7] *Penry I*, 492 U.S. at 319, 109 S.Ct. 2934.

[8] *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[9] *Penry I*, 492 U.S. at 318, 109 S.Ct. 2934.

sented to be unique, severe, permanent, or a handicap. We have found that certain evidence "fails to rise to the level of Penry evidence,"[10] or is "not the same quality and character as Penry's."[11] These statements, however, were made in the context of determining whether a nexus existed between the mitigating circumstance and the defendant's moral culpability, thereby allowing the jury to find the defendant less culpable by contemporary moral values.[12]

In Mines,[13] we considered the permanence of the mitigating circumstance to be relevant to a determination of whether the evidence necessitated a *Penry I* instruction. However, we considered it relevant to the issue of whether the jury could give mitigating effect to the evidence within the special issues and not to whether the evidence demonstrated a nexus between the mitigating circumstance and the defendant's moral culpability for the crime.[14]

Regarding the second requirement, the Court in *Penry I* not only found that the evidence regarding mental retardation was relevant to the question of deliberateness, but also determined that the evidence had mitigating relevance beyond the scope of the special issue.[15] The Court held that without an instruction defining "deliberately" to mean that the jury must consider mitigating evidence fully as it bears on personal culpability, the Court could not be sure that the jury was able to give effect to the mitigating evidence through the deliberateness question.[16] The Court determined that the evidence

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[10] *Cantu v. State*, 842 S.W.2d 667, 693 (Tex.Crim.App.1992); *Earhart v. State*, 823 S.W.2d 607, 632 (Tex.Crim.App.1991).

[11] *Goss v. State*, 826 S.W.2d 162, 166 (Tex.Crim.App.1992).

[12] *Richardson v. State*, 879 S.W.2d 874, 885 (Tex. Crim.App.1993).

[13] *Mines v. State*, 888 S.W.2d 816, 817-818 (Tex.Crim.App.1994).

[14] *Id.*

[15] *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934.

[16] *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934.

was also relevant to the future dangerousness question, but only as an aggravating factor, placing the mitigating relevance beyond the scope of the special issues.[17] The Court cited the concurrence from Franklin[18] stating that an Eighth Amendment analysis is required if mitigating evidence is introduced that is not relevant or that has relevance beyond the scope of the special issues.[19]

Although our *Penry I* decisions may be consistent with those of the Fifth Circuit, the Fifth Circuit's decisions are not necessarily consistent with our precedent. In addition to the nexus and scope requirements we have applied to *Penry I* cases, the Fifth Circuit has imposed an independent, multi-faceted requirement that the evidence must demonstrate that the mitigating circumstance constitutes a uniquely severe permanent handicap. Though we have interpreted *Penry I* narrowly, I do not believe we have, nor do I believe it should be, interpreted as narrowly as the Fifth Circuit has done. The majority and concurrence appear to ignore our precedent in favor of the Fifth Circuit's *Penry I* test. I think this is a grave injustice. While the factors involved in the Fifth Circuit's independent requirement may be helpful to consider in determining whether a defendant's evidence meets the nexus and scope requirements, as they were in *Penry I*, they should not be determining factors. Such an interpretation undermines the reasoning in *Penry I*, because a defendant whose mitigating evidence meets the nexus and scope requirements may still be deprived of a supplemental instruction so that the jury is precluded from considering and giving effect to evidence relevant to the defendant's moral culpability for the offense.

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[17] *Penry I*, 492 U.S. at 323, 109 S.Ct. 2934.

[18] *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

[19] *Penry I*, 492 U.S. at 321, 109 S.Ct. 2934.

Our precedent, without adopting the Fifth Circuit's additional independent requirement, does not suggest that all nullification instructions are constitutionally infirm in all cases in which the defendant offers any mitigation evidence. The mitigating evidence must meet the nexus and scope requirements. Good character evidence would not usually meet the nexus requirement, whereas evidence of the defendant's age would not usually meet the scope requirement. These two requirements, without more, have been effective at limiting the application of *Penry I* to cases to which the Supreme Court's reasoning in *Penry I* applies.

For example, in *Richardson*, we found that Richardson made no evidentiary showing that either his alleged childhood experiences of poverty, parental neglect, illiteracy, and possessing a speech disorder, or the alleged fact that his mother taught him to shoplift, tended to excuse his capital crime. We stated that our conclusion might be different if Richardson had presented evidence that his mother had taught him to kill or commit other crimes of violence, or if his capital crime had begun as a robbery. Evidence of this nature might, from the viewpoint of society, tend to excuse the defendant's criminal behavior because the crime was caused in part by a personality that was damaged through no fault of his own.[20]

Applying *Penry I* to Smith's evidence

Unlike in *Richardson*, in this instance, the offense began as a robbery, and Smith's father had, if not taught his son to steal, modeled such behavior to the extent that Smith copied his father's behavior both at home and at school by taking things that did not belong to him. In addition to stealing, his father demonstrated on at least one occasion that it was acceptable behavior to threaten someone with bodily harm in an attempt to obtain another's property. Although the record does not reflect precisely when certain events occurred in his

[20] *Id.*

household, Smith was nineteen years old at the time of the offense, so there was not a substantial length of time separating his childhood experiences from his criminal behavior. In fact, he was still living with his mother. In short, the record contains evidence from which a rational jury could conclude that Smith's criminal conduct was in some way attributable to his unfortunate childhood experiences.[21] The jury, applying contemporary moral standards, could rationally have found Smith less morally culpable for his behavior than if he had not had such childhood experiences. I would therefore find Smith's evidence provided a sufficient nexus.

Under the first special issue, evidence of Smith's troubled childhood, if relevant at all without an additional definition of deliberately defined in terms of moral responsibility, would only be aggravating. The evidence may indicate that Smith acted deliberately, although perhaps unaware of the influence that his background had on his deliberations, in deciding to participate in the robbery and murder. Under the second special issue, the evidence, again, could only be aggravating. The evidence would indicate that Smith's unhappy background did in fact pervade his personality to such an extent that it continued to affect his behavior and choices, which the record reflects may have escalated in violence over the years. The jury could have determined that Smith's damaged personality could nevertheless be rehabilitated or that his behavior in response to his childhood was due in part to his youth or the proximity of his home-life experiences to the offense. However, if the jury determined that growing out of his youth would not remove the indelible influence of his childhood and he would therefore present a future and continuing danger to society and yet believed that the explanation for his behavior made the death penalty inappropriate, the jury could not have expressed this view through the special issues. Thus,

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[21] *See Richard v. State*, 842 S.W.2d 279, 283 (Tex. Crim.App.1992).

such evidence could not be given a mitigating effect by the jury's answers to the special issues, and Smith was entitled to an additional instruction providing the jury with a vehicle to give effect to his mitigating evidence.

The jury might have concluded, as the majority suggests, that evidence that Smith's behavior in school was often "exemplary" despite applicant's limitations and difficulties indicated that Smith could learn from his mistakes and evaluate the consequences of his actions. However, the jury may also have concluded that evidence that his often "exemplary" behavior was increasingly interrupted with disruptive and even criminal behavior, indicated that try as he might, Smith was not able, as hopefully people in general are able to do, to control his impulses and surmount and learn from his negative experiences. The jury did not need an expert witness to draw this reasonable conclusion from them.

Penry II's holding—unconstitutional nullification instruction

Unlike the majority, I do not find that the nullification instruction Smith received is significantly distinguishable from the one reviewed by the Supreme Court in *Penry II*. None of the differences between the instructions in *Penry II* and the instant case alter the fundamental aspects of the vehicle that was provided to the jury in an attempt to allow the jury to consider and give effect to the defendants' mitigating evidence. This vehicle, not merely the description of it, was at the heart of the Supreme Court's reasoning in determining that the instruction in *Penry II* was insufficient. The Supreme Court made this clear by assuming the jury could have understood that the instructions operated in the manner the State argued: by allowing the jury to change to a negative its answer to one of the special issues based on something other than what the question asked.[22] Therefore, providing the

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[22] *Penry II*, 532 U.S. at 798-99, 121 S.Ct. 1910.

same vehicle in more explicit terms does not overcome the defects identified in *Penry II*.

Additionally, the same contradiction between the verdict form and the supplemental instructions exists here as in *Penry II*.[23] The verdict form still contained only the language of the special issues. Even if the nullification instruction clearly trumped the instructions regarding how to answer the special issues, a juror could have reasonably believed that following the instructions would violate the juror's oath to render a true verdict. A juror believing this could have reasonably concluded that there was, therefore, no effective vehicle for expressing the view that Smith did not deserve a death sentence because of his mitigating evidence.

The majority focuses on the use of mandatory language used in Smith's instructions versus the permissive language used in the instructions given to Penry. Although I find mandatory language in Penry's instructions equivalent to that in Smith's, I find no merit in this argument because making it mandatory rather than permissive to return a false answer makes the answer no less false. Such an answer would be given in vio'ation of the juror's oath to render a true verdict, when the verdict form contained only the language of the statutory special issues.

Even if Smith's nullification instruction is more similar to the instruction in Robertson than to the one in *Penry II*, the Fifth Circuit did not determine that such a nullification instruction would be sufficient where *Penry I* evidence exists.[24] In its en banc opinion on rehearing, the Fifth Circuit reasoned that the nullification instruction was redundant in Robertson's case because it determined that the jury could give effect to the mitigating evidence within the scope of the

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[23] *Penry II*, 532 U.S. at 799, 121 S.Ct. 1910.

[24] *Robertson v. Cockrell*, 325 F.3d 243, 258 (5th Cir.2003), *cert. denied*, 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003).

special issues.[25] In the original panel opinion on remand, the Fifth Circuit did not determine whether Robertson was entitled to a *Penry* instruction; it found Robertson's instructions fell prey to the same defects the Supreme Court identified in *Penry II*. The statement in Robertson, quoted by the majority, does not support the majority's conclusion that a distinction in the wording of the instruction cured the defects identified in *Penry I*. That quote refers to the Fifth Circuit's reasoning that because the answers to the special issues would be the same regardless of the supplemental instruction where the mitigating evidence could be considered within the scope of the special issues, there would be no potential for contradiction and the jury would not be forced into the position of falsely answering "no" to the supplemental instructions.

It also does not follow that "if Robertson was not entitled to relief under *Penry II*, then applicant is not entitled to relief." Robertson was remanded to the Fifth Circuit by the Supreme Court after *Penry II* because *Penry II* is applicable to cases beyond Penry's. The Fifth Circuit had previously affirmed Robertson's death sentence based on the appropriateness of the nullification instruction. However, after *Penry II*, whether Robertson's nullification instruction was sufficient as to Robertson's evidence was called into question. We stayed Robertson's execution in light of our pending review of Smith.

I also note that while the Fifth Circuit said, in its en banc opinion in Robertson, that Texas trial courts "could not craft entirely new jury interrogatories, because the precise questions had been written by the state legislature,"[26] the same year that we approved of the trial courts' use of nullification instructions in Fuller, we also determined it was not error for trial courts to have submitted judicially-crafted jury inter-

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[25] *Robertson*, 325 F.3d at 257.

[26] *Robertson*, 325 F.3d at 248-49.

rogatories in an effort to comply with *Penry I*'s mandate.[27] There existed a reasonable likelihood that the jury, under oath to return a true verdict, applied the nullification instruction in a way that precluded them from giving effect to Smith's mitigating evidence.

Based on the Supreme Court's reasoning in *Penry II*, I would conclude that the nullification instruction Smith received would not be a sufficient vehicle, under *Penry I*, to allow the jury to give effect to the defendant's mitigating evidence relevant beyond the scope of the special issues.

Because the mitigating value of Smith's evidence could not be considered and given effect within the special issues and the jury was not provided with a sufficient vehicle for expressing its reasoned moral response to his evidence, the Texas capital punishment statute operated in an unconstitutional manner as applied to Smith. But for his failure to object to the nullification instructions at trial, Smith would be entitled to a new punishment hearing.

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[27] *State v. McPherson*, 851 S.W.2d 846, 850 (Tex. Crim.App.1992).

Opinion on a Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals
U.S. Supreme Court
Smith v. Texas, 543 U.S. 37 (2004)

SUPREME COURT OF THE UNITED STATES

No. 04-5323

LAROYCE LATHAIR SMITH,

v.

TEXAS.

Nov. 15, 2004

I

In 1991, petitioner was convicted of brutally murdering one of his former co-workers at a Taco Bell in Dallas County. The victim and one of her co-workers were closing down the restaurant when petitioner and several friends asked to be let in to use the telephone. The two employees recognized petitioner and let him in. Petitioner then told his former co-workers to leave because he wanted to rob the restaurant. When they did not leave, petitioner killed one co-worker by pistol-whipping her and shooting her in the back. Petitioner also threatened, but did not harm, his other former co-worker before exiting with his friends. The jury found petitioner guilty of capital murder beyond a reasonable doubt.

At the punishment phase, the jury was instructed on two special issues: first, whether the killing was deliberate; and second, whether the defendant posed a continuing danger to

others.[1] Approximately two years prior to the trial, we had held that presenting only these two special issues, without additional instructions regarding the jury's duty to consider mitigation evidence, violated the Eighth Amendment. *Penry v. Lynaugh,* 492 U. S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) *(Penry I).* Shortly after petitioner's trial, the Texas Legislature amended its capital sentencing scheme to require juries to take "into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" in deciding whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. *Penry II, supra,* at 803, 121 S.Ct. 1910 (quoting Tex.Code Crim. Proc. Ann., Art. 37.071(2)(e)(1) (Vernon Supp.2001)). Petitioner, however, did not receive the benefit of the new statutory instruction at his trial. Instead, just as in *Penry II,* petitioner was sentenced pursuant to a supplemental instruction provided to the jury by the trial judge.[2] THAT INSTRUCTION Read:

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[1] The text of the special issues given to the jury was as follows: "(1) Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result? (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" Pet.for Cert. 5.

[2] The supplemental instruction in *Penry II* stated:" 'You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating

"'You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

"'In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death

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evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.'" 532 U.S., at 789-790, 121 S.Ct. 1910 (emphasis added).

sentence should be imposed despite the mitigating evidence, if any, admitted before you.

"'You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.'" 132 S.W.3d, at 409.

Employing the framework of special issues modified by the supplemental nullification instruction, the jury considered a variety of mitigation evidence. Petitioner presented evidence that (1) he had been diagnosed with potentially organic learning disabilities and speech handicaps at an early age; (2) he had a verbal IQ score of 75 and a full IQ of 78 and, as a result, had been in special education classes throughout most of his time in school; (3) despite his low IQ and learning disabilities, his behavior at school was often exemplary; (4) his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction; and (5) he was only 19 when he committed the crime.

In response, the prosecution submitted evidence demonstrating that petitioner acted deliberately and cruelly. The prosecution emphasized that petitioner knew his victim, yet stabbed her repeatedly in numerous places on her body. With respect to petitioner's future dangerousness, the prosecution stressed that petitioner had previously been convicted of misdemeanor assault and proffered evidence suggesting that he had violated several drug laws.

During closing arguments at the punishment phase, the prosecution reminded the jury of its duty to answer truthfully the two special issues of deliberateness and future dangerousness.

> "Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now." Pet. for Cert. 6.

The jury verdict form tracked the final re minders the prosecution gave the jury. The form made no mention of nullification. Nor did it say anything about mitigation evidence. Instead, the verdict form asked whether petitioner committed the act deliberately and whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury was allowed to give "Yes" or "No" answers only. The jury answered both questions "Yes" and sentenced petitioner to death. App. 4 to Pet. for Cert.

On direct appeal, petitioner argued that our holding in *Penry I* rendered his jury instructions unconstitutional because the special issues did not allow the jury to give effect to his mitigation evidence. The Texas Court of Criminal Appeals affirmed petitioner's sentence, reasoning that the nullification instruction provided an adequate vehicle through which the jury could consider petitioner's evidence. We denied certiorari on May 15, 1995. *Smith v. Texas*, 514 U.S. 1112, 115 S.Ct. 1967, 131 L.Ed.2d 857.

Petitioner filed an original writ of habeas corpus in the trial court in 1998. That suit was dismissed as untimely, but the Texas Legislature amended its criminal code in such a way as to allow petitioner to file a timely writ. Petitioner did so,

claiming that his jury was instructed in violation of the Eighth Amendment. Before the Texas Court of Criminal Appeals, petitioner argued that the jury instructions in his case ran afoul of our holding in *Penry II*. The court denied petitioner's application on the merits. 132 S.W.3d 407 (2004).[3]

II

The Texas Court of Criminal Appeals issued its opinion just prior to our decision in *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). In *Tennard*, we reversed the Fifth Circuit's refusal to grant a certificate of appealability (COA) to a defendant who was sentenced under the Texas capital sentencing scheme prior to the legislative revisions which took place in the aftermath of *Penry I*. Tennard, relying upon *Penry I*, argued that Texas' two special issues—deliberateness and future dangerousness—did not allow the jury to give effect to his mitigation evidence and that the trial court's failure to issue a supplemental mitigation instruction that would allow the jury to give full effect to his evidence rendered his death sentence unconstitutional. The state court and the Fifth Circuit both held that the lack of an adequate mitigation instruction was irrelevant. The courts both determined that Tennard had failed to satisfy the Fifth Circuit's threshold standard for "'constitutionally relevant' mitigating evidence, that is, evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,' and evidence that 'the criminal act was attributable to this severe permanent condition.'" 542 U.S., at 281, 124 S.Ct., at 2568 (some internal quotation marks omitted).

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[3] Four judges would have found petitioner's claim procedurally defaulted. See 132 S.W.3d, at 417 (Hervey, J., concurring); *id.*, at 428 (Holcomb, J., concurring). The majority of the court, however, declined to adopt this holding and reached petitioner's claims on the merits.

Our rejection of that threshold test was central to our decision to reverse in *Tennard*. We held that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Id.*, at 284, 124 S.Ct., at 2570. Rather, we held that the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by "'"evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."'" *Id.*, at 284-285, 124 S.Ct., at 2570 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)).

The Texas Court of Criminal Appeals relied on precisely the same "screening test" we held constitutionally inadequate in *Tennard*. 132 S.W.3d, at 413 (holding that mitigation evidence requires a special instruction only when that evidence passes the threshold test of "whether the defendant's criminal act was 'due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own'" (quoting *Robertson v. Cockrell*, 325 F.3d 243, 251 (C.A.5 2003) (en banc)). Employing this test, the court concluded that petitioner's low IQ and placement in special-education classes were irrelevant because they did not demonstrate that he suffered from a "severe disability." 132 S.W.3d, at 414. But, as we explained in *Tennard*, "[e]vidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" 542 U.S., at 288, 124 S.Ct., at 2572 (some internal quotation marks omitted) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). There is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-

education classes as a reason to impose a sentence more lenient than death. Indeed, we have held that a defendant's IQ score of 79, a score slightly higher than petitioner's, constitutes relevant mitigation evidence. See *Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); see also *Tennard, supra*, at 288, 124 S.Ct., at 2572-73).

The state court also held that petitioner had offered "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." 132 S.W.3d, at 414. We rejected the Fifth Circuit's "nexus" requirement in *Tennard, supra*, at 287, 124 S.Ct., at 2571-72 (noting that none of our prior opinions "suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered" and holding that the jury must be allowed the opportunity to consider *Penry* evidence even if the defendant cannot establish "a nexus to the crime").

That petitioner's evidence was relevant for mitigation purposes is plain under our precedents, even those predating *Tennard*. See, e.g., 492 U.S., at 319-322, 109 S.Ct. 2934; *Payne v. Tennessee*, 501 U.S. 808, 822, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991); *Boyde v. California*, 494 U.S. 370, 377-378, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). *The state court, however, erroneously relied on a test we never countenanced and now have unequivocally rejected. We therefore hold that the state court "assessed [petitioner's legal] claim under an improper legal standard."* Tennard, supra, *at 287, 124 S.Ct., at 2572. Because petitioner's profered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the "nullification instruction" satisfied that charge is the question to which we now turn.*

III

The Texas Court of Criminal Appeal sheld that even if petitioner did proffer relevant mitigation evidence, the supplemental "nullification instruction" provided to the jury adequately allowed the jury to give effect to that evidence. The court found it significant that the supplemental instruction in this case "told the jury that it 'shall' consider all mitigating evidence, even evidence unrelated to the special issues, [and] it also told the jury how to answer the special issues to give effect to that mitigation evidence." 132 S.W. 3d, at 416. The court also concluded that the nullification instruction made it clear to the jury that a "No" answer was required if it "believed that the death penalty was not warranted because of the mitigating circumstances." *Ibid.*

In *Penry II*, we held that "the key under *Penry I* is that the jury be able to 'consider and *give efect to* [a defendant's mitigation] evidence in imposing sentence.'" 532 U.S., at 797, 121 S.Ct. 1910 (quoting *Penry I, supra*, at 319, 109 S.Ct. 2934); see 532 U.S., at 797, 121 S.Ct. 1910 (quoting *Johnson v. Texas*, 509 U.S., at 381, 113 S.Ct. 2658 (O'CONNOR, J., dissenting) ("[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances" (emphasis in *Johnson*))). We explained at length why the supplemental instruction employed by the Texas courts did not provide the jury with an adequate vehicle for expressing a "reasoned moral response" to *all* of the evidence relevant to the defendant's culpability. 532 U.S., at 796, 121 S.Ct. 1910. Although there are some distinctions between the *Penry II* supplemental instruction and the instruction petitioner's jury received, those distinctions are constitutionally insignificant.

Penry II identified a broad and intractable problem—a problem that the state court ignored here–inherent in any requirement that the jury nullify special issues contained within a verdict form.

> "We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'"
>
> "The mechanism created by the supplemental instruction thus inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions. There is, at the very least, 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration' of Penry's mental retardation and childhood abuse. The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence." *Id.*, at 799-800, 121 S.Ct. 1910 (citations omitted).

It is certainly true that the mandatory aspect of the nullification instruction made petitioner's instruction distinct from Penry's. Indeed, the "shall" command in the nullification instruction resolved the ambiguity inherent in the *Penry II* instruction, which we held was either a nullification instruction or an instruction that "'shackled and confined'" Penry's mitigating evidence within the scope of the impermissibly narrow special issues. *Id.*, at 798, 121 S.Ct. 1910. That being

said, the clearer instruction given to petitioner's jury did not resolve the ethical problem described *supra*, at this page.[4] To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors. Just as in *Penry II*, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented.[5] Even if we were to assume that the jurors could easily and effectively

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[4] The concurring opinions below straightforwardly recognized this problem. See 132 S.W.3d 407, 427 (Tex.Crim.App.2004) (Hervey, J., concurring) (concluding that the "'nullification' instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond 'the effective reach of the sentence'" and conceding that the instruction given to petitioner may have been inadequate "as a matter of federal constitutional law"); *id.*, at 428 (Holcomb, J., concurring) ("The nullification instruction provided to Smith's jury contained the same defects the Supreme Court identified in *Penry II*. Therefore, the jury was unconstitutionally precluded from considering and giving effect to Smith's mitigating evidence").

[5] There is another similarity between this case and *Penry II*. In *Penry II*, we found it significant that the prosecutor admonished the jury to "'follow your oath, the evidence and the law'" prior to the deliberations in which the jury was required to fill out the verdict form. 532 U.S., at 802. We held that this statement sent the jury "mixed signals" and "only reminded the jurors that they had to answer the special issues dishonestly in order to give effect to Penry's mitigating evidence." *Ibid.* 121 S.Ct. 1910. The prosecutor here similarly reminded the jury that each and every one of them had promised to "follow the law" and return a "Yes" answer to the special issues so long as the State met its burden of proof. Pet. for Cert. 6. Thus, the nullification instruction presented the same ethical dilemma here and, what is more, it seems that despite the inclusion of the mandatory "shall" language, the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed.

have comprehended an orally delivered instruction directing them to disregard, in certain limited circumstances, a mandatory written instruction given at a later occasion, that would not change the fact that the "jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence." *Penry II*, 532 U.S. at 801, 121 S.Ct. 1910.

There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*. The judgment of the Texas Court of Criminal Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I would affirm the judgment of the Texas Court of Criminal Appeals. See *Walton v. Arizona*, 497 U.S. 639, 673, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (SCALIA, J., concurring in part and concurring in the judgment).

State's Brief on Remand to the Texas Court of Criminal Appeals; *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals (March 15, 2005)

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

No. 74,228

EX PARTE

LAROYCE LATHAIR SMITH,

Applicant,

On remand from the Supreme Court of the United States, Cause No. 04-5323, Reversing This Court's Judgment on Applicant's Petition for Writ of Habeas Corpus from Dallas County in Cause Number 74,228

STATE'S BRIEF ON REMAND

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TO THE HONORABLE COURT OF
CRIMINAL APPEALS:

Respondent, the State of Texas, submits this brief on remand.

STATEMENT OF THE CASE

LaRoyce Lathair Smith was convicted and sentenced to death on June 14, 1991 for the capital murder of Jennifer Soto. On. June 22, 1994, in an unpublished opinion, this Court affirmed his conviction on direct appeal. *Smith v. State*, No. 71,333, slip op. at 10 (Tex. Crim. App. June 22, 1994) (not designated for publication). The United States Supreme Court denied certiorari review. *Smith* v. *Texas*, 514 U.S. 1112 (1995). Applicant then filed his first application for writ of habeas corpus in state court, but it was dismissed as untimely on July 16, 1998. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App, 1998). The Supreme Court again declined to issue a writ of certiorari. *Smith v. Texas*, 525 U.S. 1148 (1999). Applicant next filed a federal petition for habeas relief, but the United States District Court dismissed the proceeding without prejudice so that applicant could return to the Texas courts pursuant to newly enacted procedures for untimely habeas applications. *Smith v. Johnson*, No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A (Vernon Supp. 2004-2005).

On March 17, 2000, applicant filed his second state application for writ of habeas corpus alleging, for the first time, jury charge error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Penny 1). While the application was pending, the Supreme Court issued *Penry II*. *Penry v. Johnson*, 532 U.S. 782 (2001). This Court accepted supplemental briefing and heard argument in light of *Penry*. On April 21, 2004, this Court issued its opinion denying habeas relief. *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004). Applicant again filed a petition for writ of certiorari in the United States

Supreme Court and, on November 15, 2004, the Supreme Court granted relief and reversed this Court's judgment. *Smith v. Texas*, 125 S.Ct. 400 (2004). This Court ordered the parties to file briefs on remand by March 11, 2005.

SUMMARY OF STATE'S ARGUMENT

I. This Court may, and should, apply the rule of procedural default to affirm applicant's death penalty sentence. Such a holding, based on applicant's failure to raise any objection to the punishment charge until nine years after his conviction, would be an independent and adequate state ground for denying relief.

II. This Court's opinion contained three alternative holdings that were independently sufficient to deny habeas relief: (1) applicant's mitigation evidence did not satisfy the *Tennard* screening test for *Penry* error, (2) applicant's mitigation evidence was not effectively beyond the reach of the special issues, and (3) the supplemental nullification instruction in this case was distinguishable from the instruction struck down in *Penry II*. The Supreme Court opinion reversed the first and third holdings, but did not address the second holding. Consequently, this Court may deny relief based on the extant holding that the two special issues in the charge provided the jury with a constitutionally sufficient vehicle to give effect to applicant's mitigating evidence.

ARGUMENT

I. Under Texas law, applicant's jury charge complaint may not be raised for the first time on habeas review.

In his second application for habeas relief, applicant claimed for the first time that the "nullification" instruction in the court's punishment charge violated *Penry I*. A majority of this Court disagreed with the merits of applicant's claim. Four justices in two concurring opinions concluded, however, that applicant had procedurally defaulted the claim by raising it

for the first time on habeas review. *Smith*, 132 S.W.3d at 423 (Hervey, J., concurring) and 428 (Holcomb, J., concurring).

In its per curiam opinion, the Supreme Court agreed with applicant, reversed the majority opinion, and remanded the case "in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above states [sic], as accord with right and justice, and the Constitution and Laws of the United States." The State urges this Court on remand to reconsider the issue of procedural default *as* an adequate and independent state ground upon which applicant's sentence may, and should, be affirmed. *See Kunkle v. Texas*, 125 S.Ct. 818, 2004 U.S. LEXIS 8274 (2004) (Stevens, J., concurring) (noting that, where the Texas Court of Criminal Appeals' decision is independently based on state procedural ground, Supreme Court lacks jurisdiction to review the matter). This Court previously has relied on procedural default to affirm a conviction on remand after the Supreme Court vacated a judgment by this Court affirming the conviction on direct appeal. *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crina. App. 2002).

Applicant's habeas claim alleges that the punishment charge in this case violated the Eighth Amendment under the reasoning in Penry I. For cases tried before 1989, the year Penry I issued, such claims were not forfeited by the failure to object at trial. E.g. *Selvage v. Collins*, 816 S.W.2d 390, 391 (Tex. Crim. App. 1991); *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991). This is not applicant's situation, however. Applicant was convicted in 1991, two years after Penry I issued. For constitutional rights recognized at the time of trial, the failure to object results in procedural default for purposes of both an appeal and a habeas writ application. See *Garcia v. State*, 887 S.W.2d 846, 861 (Tex. Crim. App. 1994); *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

The constitutional nature of applicant's complaint does not bar the application of the procedural default rule. Under Texas case law, Eighth Amendment claims may be defaulted by the failure to object at trial. *See Buxton v. Collins*, 925 F.2d 816, 821-22 (5th Cir. 1991) (concluding that petitioner's failure to object to jury charge procedurally defaulted his Eighth Amendment *claim* that jury was prevented from giving mitigating effect to evidence that he was non-shooter); *Ex parte Davis*, 866 S.W.2d 234, 238 (Tex. Crim. App. 1993) (concluding that applicant forfeited his Eighth Amendment claim by failing to object to the prosecutor's remarks during voir dire and punishment argument). Likewise, complaints regarding defense-oriented jury instructions may not be raised for the first time on appeal. *See Pondexter v. State*, 942 S.W.2d 577, 588 (Tex. Crim. App. 1996) (plurality op.) (concluding Pondexter waived his complaint regarding an instruction that the jury answer the first special issue affirmatively if they believed the mitigating evidence militated in favor of a life sentence); *Posey v. State*, 966 S.W.2d 57, 61 (Tex. Crim. App. 1998) (holding that code of criminal procedure article 36.14 mandates an objection to claimed errors of commission and omission in jury charge).

In the trial of this case, applicant filed a pretrial motion entitled "Motion to Reveal Mitigation Charge." (CR: 87, attached to this brief as Exhibit A). In the motion, defense counsel acknowledged the uncertain state of the law after *Penry I* and revealed that he anticipated presenting *Penry* evidence at trial. Defense counsel asked to *see* the court's charge on mitigation evidence prior to the commencement of voir dire. The trial judge granted this request. Prior to the commencement of voir dire, the trial judge confirmed that defense counsel had received a copy of the mitigation charge, as requested. (RR6; 3, record excerpt attached to this brief as Exhibit B). The court then told defense counsel:

> If you see something in that charge that you'd like worded differently or you think could be made clearer or

> better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

(RR6: 3-4).

Despite the trial court's invitation, counsel made no objections or changes to the mitigation (nullification) charge. Voir dire commenced. As noted in Judge Hervey's concurring opinion in this case, all the prospective jurors who ultimately served on the jury were carefully questioned as to whether they understood and could apply the nullification charge if the case went to punishment. *See infra* notes 2, 3, and 4; *Smith,* 132 S.W.3d at 420 (Hervey, J., concurring). During the punishment charge conference, defense counsel made lengthy objections to the charge, *none* of which involved the nullification instruction. (RR32: 155-67) (record excerpt attached as Exhibit C to this brief). Applicant filed a motion for new trial and an amended motion for new trial, neither of which contained any jury charge complaint. (CR: 126, 127). So applicant not only failed to lodge a trial objection to the nullification instruction of which he now complains, but he declined the trial judge's specific invitation to do so.

Nor did applicant raise the issue on direct appeal. In his sixth point of error, applicant challenged a pretrial ruling made by the trial court rejecting applicant's claim that code of criminal procedure art. 37.071 was unconstitutional in that it provided no effective vehicle for a jury to apply mitigating evidence. Thus, applicant's complaint on direct appeal was a statutory one. He did not complain about, or even mention, the court's charge, presumably because be believed that the nullification instruction cured the *Penry* problem or the issue had not been preserved for appellate review. *See* Exhibit I. (excerpt from defense brief on direct appeal). And, incidentally, applicant's first application for writ of habeas corpus, which was dismissed as untimely, likewise contained

no complaint about the nullification charge. *See* Exhibit E (excerpt from first writ application).

Nine years after applicant declined the trial judge's invitation to object to the nullification charge, he challenged that charge for the first time on habeas review. He presents no justification for having waited so long, and the delay serves only to frustrate society's interest in the prompt administration of justice. There is no doubt that applicant's attorney was aware of the issue at trial, and by all accounts, approved of the charge. The fact that *Penry II* had not yet issued is inconsequential: *Penry II* was not new law but only reiterated the holding in *Penry I*. *See Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir.) (en banc), *cert. denied*, 539 U.S. 979 (2003). Moreover, as Judge Hervey's concurring opinion points out, applicant's second habeas application raising the nullification charge complaint did predate *Penry II*, so the issuance date of *Penry II* was necessarily inconsequential to applicant's ability to challenge the nullification instruction. *Smith*, 132 S.W.3d at 424 (Hervey, J., concurring).

Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal. *See Smith*, 132 S.W.3d at 424 (Hervey, J., concurring) and 428 (Holcomb, J., concurring); *Ex parte Pena*, 71 S.W.3d 336, 338 (Tex. Crim. App. 2002) (holding that even if Pena alleged a constitutional or jurisdictional defect, he would not be entitled to habeas corpus relief because he could have, and should have, complained about a fine at the time it was imposed or on direct appeal); *see also Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (writ of habeas corpus may not be used to litigate matters that should have been raised on direct appeal).

The highest court of a state is the final arbiter of what is state law, and its pronouncement is to be accepted by federal courts as defining state law. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (U.S. 1940). The Supreme Court will

not review a decision by a state's highest court if it rests on a state law ground independent and adequate by itself to support the result. *Dretke v. Haley*, 124 S.Ct. 1847, 1851-52 (2004). In certain exceptional cases, such as where application of the procedural rule would serve no perceivable state interest, the subsequent federal claim is not barred. *See Lee v. Kemna*, 534 U.S. 362, 376-378 (2002).[1]

A decision in this case based on procedural default would not be a meaningless application of form over substance. It would further the State's important interest in ensuring that "counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Osborne v. Ohio*, 495 U.S. 103, 123 (1990); *see also Fuentes v. Dretke*, 89 Fed. Appx. 868, 874 (5th Cir. 1999) (not designated for publication) (holding that Texas's requirement that a request for a jury instruction be on the record or in writing is not a meaningless ritual). Particularly where, *as* here, defense counsel declines the trial court's invitation to object to or amend the charge, a reversal of the conviction at this late date makes a mockery of the contemporaneous objection rule, and it encourages the use of piecemeal and delayed litigation to prevent the finality of convictions.

Moreover, any prejudice to applicant caused by the application of procedural default in this case is fictive. The Supreme Court held that the mandatory aspect of the trial court's nullification charge instructing the jury to elevate the

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[1] Also, in the death penalty context, a narrow exception exists to allow federal courts to hear defaulted claims only if the individual defendant shows he is "actually innocent" of the sentence he received. *See Sawyer v. Whitley*, 505 U.S. 333, 339-340 (1992). Under this burden, a defendant must show by clear and convincing evidence that but for constitutional error at his hearing, no reasonable juror would have found him *eligible* for the death penalty. *Id.* at 350. As a general rule, claims like applicant's that are based on the jury's failure to receive mitigation evidence do not satisfy this test. *Id.* at 348-349.

mitigation issue over the other two special issues in the verdict form—while resolving the ambiguity inherent in the *Penry II* instruction—"possibly intensified the dilemma faced by ethical jurors" to render true answers on the verdict form. *Smith*, 125 S.Ct. at 407. The Supreme Court further stated that the nullification instruction may have been more confusing for the jury to implement in practice than this Court assumed. *Id.* at 407, n.5.

In fact, this Court did not have to assume anything about how the jurors implemented the instruction. Each and every person who served on the jury in this case was told that a death sentence required "yes" answers to all of the special issues and that any one "no" answer would result in a life sentence.[2] The lawyers and the court went to great lengths at voir dire to explain the nullification instruction to the jurors, calling it an "escape valve" for giving the defendant a life sentence and providing examples of the type of mitigating evidence it contemplated, such as mental retardation, mental illness, an abusive childhood, or a drug or alcohol problem.[3] Each and every person who served on the jury in this case stated he understood the mitigation charge and would change a "yes" answer to "no" if the mitigation evidence warranted a life sentence.[4] Thus, the jurors knew *exactly* how to give a

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[2] *See* RR6: 117-18 (Gary Powell, Juror No. 1); RR8: 102 (Ava Meyer, Turor No. 2); RR10: 106 (Donna Coulter, Juror No. 3); RR11: 48 (Carol Keyte, Juror No. 4); RRl 1: 141, 160-61 (Thomas Morrison, Juror No. 5); RR13: 31-32 (Dottie Wright, Juror No. 6); RR15: 7 (Teresa lane, Juror No. 7); RR16: 5 (Steven Dillow, Juror No. 8); RR16: 65 (Janis Zeigler, Juror No. 9); RR20: 176 (Lynn Bartholomew, Juror No. 10); RR21: 43 (Mary Foote, Juror No. 11); RR25: 99 (Derek Fisher, Juror No. 12).

[3] *See, e.g.*, RR8: 129-30; R11.10: 117, 131; RR-11: 161-62; RR13: 65; P.R.15: 20-21; R16: 17, 70-71; RR20: 187-88; RR21: 53; RR25: 105-06.

[4] See RR6: 149-53 (Gary Powell, Juror No. 1); RR8: 112-13, 133-34 (Ava Meyer, Juror No. 2); RR10; 118, 136-37 (Donna Coulter, Juror No. 3); RR11:60 (Carol Keyte, Juror No. 4); RR11: 162-65 (Thomas Morrison, Juror No. 5RR13: 66-67 (Dottie Wright, Juror No. 6); RR15: 31-32

life sentence to applicant if they had wanted to do so, and they all agreed they would do it under the appropriate circumstances.

The Supreme Court also relied on the State's jury argument to support its conclusion that the jury was confused about how to apply the mitigation instruction, condemning the prosecutor's comments that the jury "follow the law" and return a "Yes" answer to the special issues so long as the State met its burden of proof. *Smith,* 125 S.Ct. at 407, n.5. But if it is appropriate to consider the prosecutor's argument in this matter, then it is no less appropriate to consider defense counsel's argument. In this case, defense counsel told the jury:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you—and that the State has a burden—that if you think that he should not die, you are to put "no" in one of the spaces . . . .
>
> (RR33: 55-56).

Defense counsel then listed the mitigation evidence for the jury to consider, including applicant's low intellect and difficult family life. (RR33: 56-58). Defense counsel reminded the jury that the State had to prove beyond a reasonable doubt that the death sentence should be imposed despite mitigation evidence and said, "You *shall* answer 'no' to one of the issues to give effect to your meaning." (RR33: 69) (emphasis

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(Teresa Lane, Juror No. 7); RR16: 18-19 (Steven Dillow, Juror No. 8); RR16: 70-71 (Janis Zeigler, Juror No. 9); RR20: 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); RR21: 53-54 (Mary Foote, Juror No. 11); RR25: 105-07 (Derek Fisher, Juror No. 12).

added). Thus, if the State's argument confused the jury, defense counsel's closing comments reminded the jury *exactly* how to give mitigating effect to the mitigation evidence listed in the Supreme Court's per curiam opinion.

Therefore, the theoretical concern expressed by the Supreme Court over nullification charges in general is unwarranted in this particular case. There is simply no basis for the belief that, despite their commitment during voir dire examination to use the instruction, and despite defense counsel's careful reminders of how to give effect to the mitigating evidence during closing argument, any of the jurors nevertheless ignored the instruction out of an ethical quandary to follow their oath to render a "true verdict" in answering the special issues. In fact, defense counsel told one juror specifically that, in following the mitigation instruction, "You're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules." (RR15: 32).

For the foregoing reasons, a decision by this Court holding that applicant is procedurally barred from complaining about a charge he apparently endorsed at 'trial would be an independent and adequate state ground upon which applicant's conviction could and should be properly affirmed. *See Dretke*, 124 set at 1852 (citing *Sawyer*, 505 U.S. at 336).

II. The Supreme Court's decision did not affect this Court's holding that the jury charge, irrespective of the nullification instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence.

Only the United States Supreme Court has authority to review judgments rendered by a state's highest court on claims of federal constitutional rights. See 28 U.S.C. § 1257(a) (West 1993); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923). Until the Supreme Court reviews a holding of the state's highest court on a federal issue, that state court

ruling, right or wrong, 'will stand. *See Rooker*, 263 U.S. at 415 (holding that a wrong decision by a State Supreme Court is not void but an effective and conclusive adjudication, left open to reversal or modification in an appropriate appellate proceeding before the United States Supreme Court).

Judge Cochran's majority opinion in this writ proceeding contained three alternative holdings that were independently sufficient to deny relief. The majority first concluded that (1) applicant did not show evidence of a severe and permanent handicap, not of his own making, which is at least related to the offense (the *Tennard* "screening test"), (2) applicant did not show that the disability evidence was beyond the reach of the two special issues, deliberateness and future dangerousness, and (3) the nullification instruction in. this case was a more capacious vehicle than was constitutionally warranted. *See Smith,* 132 S.W.3d at 41516, 417.

In its per curiam opinion, the Supreme Court first held that this Court erroneously relied on the *Tennard* screening test, which had limited the application of *Penry I* to cases where the evidence linked the offense to a severe and permanent handicap not of the defendant's own making. The Supreme Court concluded that applicant's mitigation evidence properly met the "low threshold for relevance" that is required by Supreme Court precedents. *Smith*, 125 S.Ct. at 404-05. Then, without deciding whether the two special issues were sufficient vehicles for the jury to give effect to applicant's mitigating evidence, the Supreme Court skipped to the question of whether the nullification instruction in this case could overcome the problems of the *Penry* nullification instruction. *Id. at* 405.[5] Concluding there was no principled

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[5] This omission in the Supreme Court's analysis is evident in the following transition found at the end of section If of the opinion: Because petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the "nullification instruction" satisfied

distinction between the two instructions, the Court held that the "nullification instruction was constitutionally inadequate wider *Penry II*" *Id.* at 407. Thus, the Supreme Court's opinion did not purport to affect this Court's holding that applicant's mitigating evidence was not beyond the reach of the first two special issues. *Smith,* 132 S.W.3d at 412-413. Stated another way, the Supreme Court found no *Penry I* error.

The Supreme Court has never held that the Texas death penalty statute prior to 1991, with its two special issues, is unconstitutional in every case, regardless of the quantity or quality of the mitigating evidence. *See Smith,* 132 S.W.3d at 413; *Lackey v. State,* 816 8.W.2d 392 (Tex. Crim. App. 1991) (concluding that *Jurek v. Texas*, 428 U.S. 262 (1976) affirmed the constitutionality of the Texas special issue practice, and *Penry* did not overrule that holding). And the Supreme Court made no such holding in this case. In scrapping the *Tennard* screening test, the Supreme Court did not hold that *all* mitigating evidence now required supplemental mitigation instructions beyond the statutory special issues. *Smith,* 125 S.Ct. at 404-405. Consequently, this Court's holding that the special issues were a sufficient vehicle for the jury to give effect to applicant's mitigation evidence remains a viable conclusion under the law and facts.

Furthermore, the Supreme Court certainly did not hold that the existence of a nullification instruction in a charge is error per se in every case. A nullification charge is simply an inadequate vehicle to correct the problem noted in *Penry I.* But neither this Court, nor the Supreme Court, has found *Penry I* error in this case.

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that charge is the question to which we now turn." *Smith,* 125 S.Ct at 405. The question that *should* have been next considered by the Court was whether the statutory special issues satisfied that Eighth. Amendment requirement.

Therefore, the majority's second holding still stands: Applicant's evidence of mental limitations was relevant to whether he acted deliberately. *Smith*, 132 S.W.3d at 414-415. Stated another way, a juror could have given mitigating effect to the evidence of applicant's mental limitations by concluding that the limitations prevented him from acting deliberately. Also, evidence of applicant's learning disability and troubled background were relevant to whether he would constitute a future danger to society. *Id.* That is, a juror could give mitigating effect to applicant's evidence of a learning disability and troubled background by concluding that, if these factors caused his criminal behavior, most people commonly rise above such circumstances, and applicant therefore would probably not commit further acts of criminal violence in the future.

Nothing in the Supreme Court opinion requires this Court to reverse these holdings. The Supreme Court's opinion focused solely on the *Tennard* screening test and the viability of the supplemental nullification instruction under *Penry II*.[6] The Supreme Court did not in any way address the adequacy of the remainder of the jury charge in light of applicant's mitigation evidence. Thus, this Court should deny relief on the ground that the jury charge, irrespective of the supplemental mitigation instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence. Right or wrong, this holding is the law of this case unless and until the Supreme Court states otherwise. *See Rooker*, 263 U.S. at 415.

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[6] This then begs the question, what did the Supreme Court intend to accomplish with its opinion in this case? Obviously, the Supreme Court had to address the Tennard test, because its opinion reversing *Tennard* issued after this Court issued its opinion relying on Tennard. Beyond this, the State suggests that the Supreme Court was merely making a statement about *all* nullification charges that, in its opinion, Texas should have but did not deduce from *Penry II*.

PRAYER

The State prays that this Honorable Court will conclude applicant has procedurally defaulted his jury charge complaint or, in the alternative, hold that the jury charge, absent the nullification instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence, and deny the relief requested by applicant.

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State's Reply Brief on Remand to the Texas Court of Criminal Appeals; *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals (March 29, 2005)

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

[Filed MAR 29, 2005]

No. 74, 228

EX PARTE
LAROYCE LATHAIR SMITH,
Applicant

On Remand from the Supreme Court of the United States, Cause No. 04-5323, Reversing This Court's Judgment on Applicant's Petition for Writ of Habeas Corpus from Dallas County in Cause Number 74,228

STATE'S REPLY BRIEF ON REMAND

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Respondent, the State of Texas, submits this brief on remand, in reply to the brief on remand filed by applicant, Laroyce Lathair Smith.

SUMMARY OF STATE'S ARGUMENT

Contrary to applicant's argument on remand, the *Penry II* error found by the Supreme Court in this case is harmless. In the event this Court rejects the arguments presented in the State's brief on remand (that applicant has procedurally defaulted this claim and that the Supreme Court's opinion did not purport to overrule this Court's conclusion that no *Penry I* error occurred), the State asks that this Court deny relief on the ground that the error is harmless.

ARGUMENT

The Nullification Instruction in This Case Did Not Harm Applicant

In his brief on remand, applicant asserts that *Penry II* error, such as that found by the Supreme Court in this case, is structural error not subject to a harmless error analysis. The State disagrees.

In *Fierro v. State*, this Court clarified that on habeas corpus review certain types of federal constitutional errors, deemed "nonstructural," are subject to a harmless error analysis; for those types of errors, it is the applicant's burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991); *see also Penry v. Johnson*, 532 U.S. 782, 785 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)) (holding that habeas relief is warranted only if the constitutional error at issue is structural error or had a "substantial or injurious" effect on the verdict). Structural error, which is not subject to a harmless error

analysis, is error that permeates "the entire conduct of the trial from beginning to end" or "*affects the framework within which the trial proceeds.*" *See Arizona v. Fulminante*, *499 U.S.* 279, 309-310 (1991).

The United States Supreme Court has not said whether Penry error is subject to a harmless error analysis. Likewise, the State has found no definitive opinions from this Court or the Fifth Circuit on the matter.[1] In 1991, in a concurring opinion in *Ex parte Goodman*, Judge Clinton noted that there were "some indications" that the Supreme Court would consider a harm analysis appropriate to *Penry* claims, *Ex parte Goodman*, 816 S.W.2d 383, 388 (Tex. Crim. App. 1991).

As recently as March 22, 2005, three judges on the United States Supreme Court confirmed Judge Clinton's belief. In *Brown v. Payton*, the Supreme Court considered whether a California trial court violated Payton's Eighth Amendment rights to have the jury consider all the mitigation evidence he presented at his capital murder trial. *Brown v. Payton*, No. 03-1039, 2005 U.S. LEXIS 2753, *6-7 (Mar. 22, 2005) (not yet reported). The alleged errors were that the written jury instructions did not make it clear that the jury could consider evidence of Payton's postcrime religious conversion and that the prosecutor was allowed to urge this erroneous interpretation during jury argument. *Payton*, slip op. at *6-7.

In a plurality opinion, the majority found no "Penry-type" error in the case after considering the written charge and context of the trial as a whole. *Payton*, slip op. at *18-25. In a dissenting opinion, Justices Souter, Stevens, and Ginsburg

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[1] *But see Bigby v. Dretke*, No. 99-11262, 2005 U.S. App. Lexis 3815 (5th Cir. Mar. 8, 2005) (not yet reported) (reversing, vacating sentence, and remanding to district court for entry of order setting aside sentence, without conducting harm analysis, after finding *Penry II* error); *Hernandez v. Johnson*, 248 F.3d 344, 379-80 (5th Cir. 2001) (Dennis, J., dissenting) (stating that *Penry* error is structural defect defying harmless error analysis).

disagreed. They stated, "The failure of the State to provide Payton with a process for sentencing that respected his clearly established right to consideration of all mitigating evidence is plain at every step of the jury's instruction." *Payton*, slip op. at *42 (Souter, J., dissenting). The dissent went on to conclude that the error was "surely substantial and injurious" and therefore not harmless under the federal harmless error standard in *Brecht*, 507 S.W.2d at 638.

The *Payton* opinions suggest two things. One, allegations of "*Penry*-type" charge error are to be considered in light of the context of the whole jury trial because "jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Payton*, slip op. at *19-20 (citing *Boyde v. California*, 494 U.S. 370, 380-381 (1990)). The jury's understanding of particular instructions "may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at *20. Second, "*Penry*-type" charge errors are subject to a harmless error analysis. *See also Calderon v. Coleman*, 525 U.S. 141, 144, 146 (1998) (holding that jury charge error which potentially prevented the jury's consideration of constitutionally relevant mitigation evidence was subject to federal harmless error review under *Brecht*). Like the California death penalty scheme, the Texas death penalty scheme should be subject to a harmless error review.

Applicant argues in his brief on remand that a *Penry* violation is structural, not trial, error because it does not involve error in the admission of evidence, but concerns a broad and intractable problem in the jury's verdict form. Applicant also points out that no court has conducted a harm analysis after a finding of *Penry* error and that a reviewing court could not possibly gauge the effect of such an error on the jury without speculating.

Contrary to applicant's assertions, jury charge error in Texas is considered trial error, subject to a harmless error analysis. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon Supp. 2004-2005) ("Review of Charge on Appeal"); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). When trial error is presented on habeas review, it is subject to the harmless error standard set out in *Fierro*, 934 S.W.2d at 374-375. The application of the harmless error rule is further supported by the fact that *Penry claims are* subject to rules of procedural default, as discussed in the State's original brief on remand. *See also Mann v. Scott*, 41 F.3d 968, 979 (5th Cir. 1994) (holding that a *Penry* claim is procedurally barred if the defendant did not actually proffer the mitigating evidence at trial).

The State agrees with applicant that the federal and state case law is not populated with harmless error reviews on *Penry* claims. But this may be because many of the early *Penry* cases deal with *Penry I* error, rather than *Penry II* error, and the courts, like applicant, have equated the error described in *Penry I* as the harm itself. That is, *Penry I* error is the jury's inability, given the pre-1991 statutory special issues, to consider the mitigating aspect of all of the defendant's mitigation evidence. In such a case, the attendant harm would be that same inability of the jury to consider the mitigating aspect of all the defendant's evidence. But *Penry II* error is the inability of a "nullification instruction" to correct the error described in *Penry I* because of the instruction's ambiguous nature and ethical ramifications. As such, if the ambiguity and ethical problems are otherwise cured in the record, a nullification instruction could operate to allow the jury to give proper mitigating effect to the defendant's evidence, and any error would therefore be harmless. That is the situation in this case.

Furthermore, as noted above, *Penry*-type claims under the California death-penalty statute regularly are subjected to a

harmless error review. *Payton*, slip op. *58 (Souter, J., dissenting); *Coleman*, 525 U.S. at 146-147. And while many trials might not have a record capable of showing harmlessness, this case is a perfect example of how *Penry II* error can, in fact, be amenable to such review.

Viewing the charge error in this case in light of the whole trial, and more particularly, the voir dire examination, applicant has not met his burden on state habeas review to prove by a preponderance of the evidence that the *Penry II* error contributed to his conviction or punishment. *Fierro*, 934 S.W.2d 372. As noted previously by the State, each and every person who served on the jury in this case was told that a death sentence required "yes" answers to all of the special issues and that any one "no" answer would result in a life sentence.[2] The lawyers and the court went to great lengths at voir dire to explain the nullification instruction to the jurors, calling it an "escape valve" for giving the defendant a life sentence and providing examples of the type of mitigating evidence it contemplated, such as mental retardation, mental illness, an abusive childhood, or a drug or alcohol problem.[3] *Each and every person who served on the jury in this case stated they understood how to use the mitigation charge and would change a 'Yes" answer to "no" if the mitigation evidence warranted a life sentence.*[4] Thus, the jurors knew

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[2] *See* RR6: 117-18 (Gary Powell, Juror No. 1); RR8: 102 (Ava Meyer, Juror No. 2); RRIO: 106 (Donna Coulter, Juror No. 3); RR11: 48 (Carol Keyte, Juror No. 4); RR11: 141, 160-61 (Thomas Morrison, Juror No. 5); RR13: 31-32 (Dottie Wright, Juror No. 6); RR15: 7 (Teresa lane, Juror No. 7); RR16: 5 (Steven Dillow, Juror No. 8); RR16: 65 (Janis Zeigler, Juror No. 9); RR20: 176 (Lynn Bartholomew, Juror No. 10); RR21: 43 (Mary Foote, Juror No. 11); RR25: 99 (Derek Fisher, Juror No. 12).

[3] *See, e.g.*, RR8: 129-30; RRI0: 117, 131; RR11: 161-62; RR13: 65; RR15: 20-21; R16: 17, 70-71; RR20: 187-88; RR21: 53; RR25: 105-06.

[4] *See* RR6: 149-53 (Gary Powell, Juror No. 1); RR8: 112-13, 133-34 (Ava Meyer, Juror No. 2); RR10: 118, 136-37 (Donna Coulter, Juror No. 3); RR11: 60 (Carol Keyte, Juror No. *4);* RR11: 162-65 (Thomas

exactly how to give a life sentence to applicant if they had wanted to do so, and they all agreed they would do it under the appropriate circumstances.

Furthermore, in his closing argument, defense counsel reminded the jury:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you and that the State has a burden—*that if you think that he should not die, you are to put "no" in one of the spaces* . . . .

(RR33: 55-56) (emphasis added). Defense counsel then identified the mitigation evidence for the jury's consideration, specifically, the evidence of applicant's low intellect and difficult family life that was of special concern to the United States Supreme Court. (RR33: 56-58); *Smith v. Texas*, 125 S.Ct. 400, 403 (2004). Defense counsel later reminded the jury that the State had to prove beyond a reasonable doubt that the death sentence should be imposed despite mitigation evidence and said, "You *shall* answer 'no' to one of the issues to give effect to your meaning." (RR33: 69) (emphasis added). Thus, defense counsel's closing comments reminded the jury exactly how to give mitigating effect to the precise mitigation evidence listed in the Supreme Court's per curiam opinion.

Morrison, Juror No. 5); RR13: 66-67 (Dottie Wright, Juror No. 6); RR15: 31-32 (Teresa Lane, Juror No. 7); RR16: 18-19 (Steven Dillow, Juror No. 8); RR16: 70-71 (Janis Zeigler, Juror No. 9); RR20: 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); RR21: 53-54 (Mary Foote, Juror No. 11); RR25: 105-07 (Derek Fisher, Juror No. 12).

Accordingly, as noted in the State's original brief on remand, the theoretical concern expressed by the Supreme Court over nullification charges in general is unwarranted in this particular case. The record supports the conclusion that each and every juror knew how to give a life sentence and would have given a life sentence if they believed applicant's mitigation evidence warranted one. In fact, defense counsel told one juror specifically that, in following the mitigation instruction, "You're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules." (RR15: 32).

The State does not dispute that the nullification instruction was unusual in that it told jurors to change a true "yes" answer to a false "no" answer on the verdict form if they believed that applicant deserved a life sentence. But while such an instruction may present a conundrum for legal minds, it certainly is not beyond the commonsense understanding of average jurors who do not "sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Payton*, slip op. at *20.

True, a juror uninformed about how to use the nullification instruction might be confused about it, but that is not the situation in this case. The jurors were educated about the "escape valve" for mitigation evidence, and all agreed they could use it. If, as applicant contends, a nullification charge makes the jurors' power to avoid the death penalty dependent on their willingness to elevate the supplemental instruction over the verdict form, then the jurors in this case indicated just such a willingness. In fact, it seems reasonable to conclude that the jury in this case probably gave *extra* consideration to applicant's mitigation evidence precisely because the mitigation instruction was somewhat out of the ordinary and was overemphasized by the parties and the trial court. The harm alleged by applicant in his case is a legal fiction based on a technical reading of the jury charge rather

than a review of the trial as a whole. There is no basis in this record to conclude that the jury did not know how to give, or would not have given, a life sentence if they believed applicant's mitigation evidence warranted one.

In fact, given the evidence at punishment, it is a reasonable conclusion that the jury, upon considering applicant's mitigation evidence, simply found it did not warrant a life sentence. By the time the punishment stage of trial began, the jury had already found applicant guilty of the torture and murder of an ex-coworker, a young woman of whose friendship he took advantage to gain entrance into the Taco Bell restaurant after business hours.[5] (RR27: 139). At punishment, the State presented evidence that applicant had previously been convicted of the aggravated assault of a young man by breaking a bat over his head and pointing a gun at him. (RR31: 25-32). While on bond and facing charges for the assault, applicant was arrested in possession of ten, individually packaged rocks of crack cocaine, worth about $100. (RR31: 121-23, 133, 137, 143-44, 149-51). The State also presented evidence of applicant's bad reputation and serious discipline problems while in school. On one occasion, he stole the rims and tires off a teacher's car, put them on his own car, pulled up outside the window of the teacher's classroom, and honked his horn so the teacher could see. (RR31: 169). Another teacher described applicant as a "portent of evil" and "big time problem." (RR32: 143, 144).

Applicant's case for mitigation, on the other hand, focused on his purported good character, not his limited mental ability or difficult family life. Of the nineteen defense witnesses presented, only one (Alberta Pringle) testified about appli-

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[5] Evidence showed that, in applicant's efforts to persuade the victim to open the store safe, he inflicted an "inhuman" pistol-whipping; a contact gunshot wound to the back; a stab wound to the neck; stab wounds to the face, scalp, abdomen, and thigh; and torture wounds just below her left breast. (RR27: 69-83, 150-51).

cant's special education history, and only one (applicant's brother, Myron Wilson) testified about his father's crack habit. (RR32: 14-43, 89-91). This entailed approximately 33 pages in the record. Two other witnesses briefly confirmed the father's drug habit, (RR32: 93, 113), and applicant's mother mentioned in passing that applicant was a "slow learner." (RR32: 125). Otherwise, the remaining 107 pages of defense testimony focused on applicant's character. In fact, contrary to the evidence of his limited mental ability, applicant's fiance testified that he has above-average intelligence, (RR32: 74), and the fiance's mother agreed applicant was of average intelligence. (RR32: 78).

The bulk of the defensive testimony was aimed at persuading the jury, not that this crime was a result of impaired mental ability or disadvantaged upbringing, but that this crime was an aberration of appellant's good character. But the State's evidence tended to show applicant's character for violence and contempt for authority. Given this state of the evidence and the jury's agreement to use the nullification charge if appropriate, this Court can have a fair (indeed, ample) assurance that the jury in this case voted for death simply because, after considering applicant's evidence, they did not believe it warranted a life sentence. The Court should therefore conclude that the nullification charge did not harm applicant or contribute to his death sentence.

PRAYER

The State prays that this Honorable Court will conclude applicant has procedurally defaulted his jury charge complaint or, in the alternative, hold that the jury charge, absent the nullification instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence, or, in the alternative, conclude that the error was harmless, and deny the relief requested by applicant.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing State's brief has been served on Matthew Paul, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711 and Jordan Steiker, attorney for applicant, 727 East Dean Keeton St., Austin, TX 78705 by depositing same in the United States Mail, postage prepaid on March 25, 2005.

/s/ Kim Schaefer
KIM SCHAEFER

Opinion on Remand from the U.S. Supreme Court, Texas Court of Criminal Appeals, *Ex parte LaRoyce Lathair Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006)

COURT OF CRIMINAL APPEALS OF TEXAS

No. AP-74228

Ex parte LAROYCE LATHAIR SMITH,
Applicant.

March 1, 2006

OPINION

COCHRAN, J., delivered the opinion of the Court in which KELLER, *P.J.*, and PRICE, WOMACK, and JOHNSON, *JJ.*, joined.

This death-penalty habeas corpus case is on remand from the United States Supreme Court.[1] Our original opinion held that the *Penry*[2] jury nullification instruction given in applicant's case was not constitutional error because: (1) applicant's mitigation evidence was not "constitutionally relevant"; (2) his evidence was encompassed by the two statutory special issues, thus no special instruction was necessary; and (3) if a special instruction was necessary, the nullification instruction sufficed.[3] The Supreme Court reversed this Court's

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[1] *Smith v. Texas*, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (*per curiam*).

[2] *Penry v. Lynaugh*, 492 U. S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[3] *Ex parte Smith*, 132 S.W.3d 407, 409, 412-16 (Tex. Crim.App.2004).

decision on the first and third issues; arguably, it did not approve of our resolution of the second issue. We now hold that, assuming that the statutory special issues were not wholly sufficient to allow the jury to give "*full* consideration and *full* effect to mitigating circumstances,"[4] applicant has failed to show "egregious harm" under *Almanza*[5] for this unobjected-to jury-charge error. We therefore deny relief.

I.

In 1991, a jury convicted applicant of capital murder for the robbery-murder of Jennifer Soto. Because an analysis of all of the evidence offered at trial is an essential component of any *Almanza* "egregious harm" analysis, we set out that evidence in detail.

First, we review the evidence from the guilt stage. The State's evidence showed that Jennifer Soto was a 19-year-old girl who worked at Taco Bell. She was a hard worker and had been promoted to shift manager two weeks before her death. Applicant had worked at Taco Bell with her. On the evening of January 7, 1991, she was "closing manager" and Travis Brown was working with her. He was waiting for her to finish her office paperwork because she was going to give him a ride home.

Meanwhile, Nickles Lewis and two other friends came to applicant's house. Applicant told them that he was going to rob Taco Bell because he needed "some money for court." The four youths left applicant's house on foot, but they were

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[4] *Penry v. Johnson*, 532 U.S. 782, 797, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*) (quoting *Johnson v. Texas*, 509 U. S. 350, 381, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (O'Connor, J., dissenting)).

[5] *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App.1984) (op. on reh'g). *See Penry v. State*, 178 S.W.3d 782, 788 (Tex. Crim.App.2005) (applying *Almanza* harmless error analysis to constitutionally erroneous jury instruction concerning use of mental impairment evidence that did not rise to level of mental retardation).

soon picked up by Kevin Shaw and one of Shaw's friends who were riding around in Shaw's car. They stopped at another house so applicant could get a gun, and applicant said, "We're going to hit T.B." Applicant knew Jennifer would be working that night. He told one of his cohorts, "If she see[s] my face, I will have to kill her."

Kevin Shaw parked the car containing the six youths across the street from the Taco Bell. Applicant, Kevin Shaw, and a third member of the group, Devario Smith, got out of the car and paced outside the Taco Bell, waiting for Jennifer to come out of the back door. They waited 45 minutes, but she did not come out. When "things didn't go right," they all got back into the car and started to leave, but applicant said, "No, man, it got to be done. It got to be done." They turned around and went back.

At about 11:30 p.m., applicant knocked on the front door and asked to use the phone because his car had broken down. Travis, without opening the door, said that the Taco Bell was closed and that applicant could not come in. Applicant then asked to see Jennifer and when she came to the door, he repeated his request. Jennifer opened the door partway and applicant hugged her as he, Kevin, and Devario went inside. She showed applicant the telephone and went back to the office to finish up her paperwork while applicant's two companions stayed in the front with Travis.

After he pretended to finish his telephone call, applicant came back to the front and told Travis that "they were going to rob the place." Kevin told Travis, "If you keep your mouth shut, you'll get a cut of the money." Applicant went back, by himself, into the office where Jennifer was working.

Shortly thereafter, Travis heard yelling. When he went to investigate, he saw applicant holding Jennifer in a headlock. He was "pistol-whipping" her on the head with the butt of a gun. He kept hitting her until the gun's handle fell off. Applicant demanded the combination of the safe, but Jennifer

screamed, "Call Tina, call Tina." She did not know the combination. Travis saw applicant step back, point the gun at Jennifer's back and shoot her at point blank range. She cried, "God, please don't let me die."

Applicant then went into the kitchen area, grabbed a butcher knife, and came back to Jennifer, continuing to demand the combination. He stabbed her underneath the left breast to make her tell him the combination, but when she did not give him the information he wanted, he stabbed her in the thigh, then the abdomen, then the head. The State characterized these as "torture type wounds." Finally, he sliced her neck, severing the jugular vein. Both the gunshot and the neck wound were fatal.

Applicant, still carrying the bloody knife, walked out to the front. Travis jumped out of the way, saying "Hey, I don't know your face. I've never seen you. I don't know anything." Applicant replied, "Hey, I know your face and I'll kill you." After applicant and his two cohorts left, Travis called 911.

Applicant testified on his own behalf and stated that he was nineteen years old at the time of the robbery-murder and that he was, by the time of trial, the father of a baby boy. He stated that when Kevin Shaw drove by on January 9, 1991, he stopped and asked applicant and his friends if applicant's "home-boy" would let Kevin use his gun. Applicant went to his friend's apartment and asked him if Kevin could buy his gun. The friend agreed and gave applicant his gun, which was in a bag. Nobody said anything about going to the Taco Bell until the car arrived there.

Then, according to applicant, Kevin suddenly announced, "I'm fixing to rob Taco Bell." Kevin explained to applicant, "Travis is going to open the back door so I can rob it." Applicant and two others waited around for a while, but Travis did not come outside, so they all left, but Kevin insisted that they return. According to applicant, Kevin

knocked on the door, Travis opened it, and Kevin, Devario, and applicant entered. Jennifer never came to the front of the store. Applicant stayed in the front with Travis until he heard a shot, and then he went back to the office and saw Kevin hitting Jennifer with the gun until it broke. Kevin told Jennifer to open the safe, but she didn't know the combination. Then Kevin picked up a butcher knife and started stabbing Jennifer. Applicant grabbed the bloody knife away from Kevin and started out of the store with it. Travis said, "Damn, man, that wasn't even in it." Applicant testified that Travis's statement meant that killing Jennifer was not part of the "plan" to rob the Taco Bell that Travis was involved in.

Applicant said that he knew Jennifer, liked her, and thought that "no one should die the way she died." According to applicant, all of the State's witnesses, including his friends who were with him that night, lied about the robbery-murder at Taco Bell. He was a "Good Samaritan" who tried to save Jennifer by grabbing Kevin's knife.

The jury rejected applicant's version of the events and convicted him of capital murder.

During the punishment phase, the State offered evidence that, two days after murdering Jennifer, applicant had physically assaulted Chris Standmier, the former boyfriend of applicant's then-current girlfriend. Chris testified that he was home for the Christmas holidays from Prairie View University. He was standing in his mother's apartment parking lot when two cars pulled up. Applicant got out of one of them, took out a baseball bat and proceeded to beat Chris with it. Applicant hit Chris so hard that the bat broke in two. As Chris lay on the ground, applicant went back to the car, pulled out a Tech 9 pistol from the car, cocked it and told Chris, "N----, get back from me. I'm going to kill you. I'll kill you." Chris said, "You got me." Then applicant got back into the car and they drove off. Chris went to the hospital.

The State also offered evidence that two months before the capital murder, officers arrested applicant on outstanding warrants as he was walking down the middle of the street in a high-crime area. While booking him into the jail, officers found ten ziplock baggies of crack cocaine in his underwear.

Several of applicant's teachers testified about applicant's conduct in school. One teacher, who taught applicant economics and math, testified that applicant was "taunting" in class and used abrasive, obscene language. He was sometimes mean and sometimes "docile." This high school teacher said that applicant seemed "threatening"—as if he would hurt the teacher—when he insisted that the teacher give him a passing grade in economics. The teacher was scared, in part because he was positive that applicant had earlier stolen his car's tires and rims.

Applicant's middle school vice-principal testified that he had suspended applicant from school for disruptive behavior in the classroom, possible weapons violations, throwing objects at teachers, and profanity. He had a bad reputation for peaceful and law-abiding activity and for respect toward authority.

A Dallas police officer, a member of the Youth Division at applicant's high school, testified that he found a Tech 9 in a locker shared by applicant and Nickles Lewis. Nickles told the officer that the gun was his, but applicant had five bullets in a bag he was carrying at the time. The officer thought applicant had a gun also, but he was unable to find it.

The defense called nineteen witnesses during its punishment case. Fifteen of those were character witnesses. Applicant's middle school assistant principal testified that he had "8,000 problems at school, but applicant wasn't one of them," because he did not recall applicant. A pastor said that applicant's family attends church, and applicant always came with his mother. "[H]e's always been an impressive young

man." He showed respect to the people at church and to his mother. When the pastor visited applicant in jail he showed remorse for Jennifer's death: he began to cry and said, "I saw her body." He thought applicant was capable of rehabilitation. The pastor said that he was aware that applicant's father stole from the family to support his crack habit. He said that such things have an adverse effect upon children: "Family troubles definitely affect the children." Although the pastor had never been to applicant's home and had never counseled applicant personally, he did not think that applicant would be a future danger to society.

The custodian of records for the special education department of the Dallas ISD testified that applicant's records showed that he could not read or do numbers in kindergarten. According to his kindergarten teacher, applicant "is a little rough, but enjoys his friends; he must be kept separate from a few because he's easily led into trouble." At the age of ten, applicant was diagnosed as learning disabled with a speech handicap. He was put into a special education reading group[6] and given speech therapy. According to these school records, when he was eleven in 1982, applicant was

> implicated in numerous thefts at school, particularly of the speech clinician's purse. School contact with the parent indicated that LaRoyce has also been believed to be stealing at home. . . . Family stresses are reported. LaRoyce's behavior in class is exemplary and it has shocked school personnel that LaRoyce has been involved in stealing. He has admitted to theft and has cried when questioned about misbehavior.

At the age of thirteen, his WISC-R I.Q. testing showed a verbal I.Q. of 75, performance I.Q. of 84, and a full scale I.Q.

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[6] In the 1991 trial, the records custodian testified that each year over 13,000 children in the Dallas Independent School District were involved with special education classes, and the district employed 800 personnel in that one department.

of 78. At the end of 1986, applicant was phased out of the special education reading program because he then performed at grade level.

A high school classmate and football player testified that applicant once came to his rescue when a group from another high school "jumped him" and stabbed him. He thanked applicant, who said, "That's what friends are for."

Applicant's fiancee, the mother of his child, testified that applicant is not violent. Applicant would advise her sisters about doing their homework and not to make mistakes like he did. "Don't do what I did, you know, and slack off." According to her, applicant "just got with the wrong people, that's all." According to the fiancee's mother, applicant acted like a surrogate father to his younger sister. "[H]e appeared to try to guide her and keep her aware of society, people, boys, and things, and help her select appropriate young men friends." He is "a person who has been taught right from wrong and who respects society and respects people." He has an "average" intelligence and "is a person who has an intelligence capable of understanding and learning."

Applicant's best friend testified that he had not seen applicant be abusive to women. Applicant's brother, Myron, worked for UPS. He testified that when applicant's father went off on his motorcycle and used crack, Myron acted as a father figure to applicant. Applicant's mother brought her VCR, TV, microwave, and Tupperware over to Myron's house so applicant's father couldn't steal them and sell them for drugs. The family problems "affected" applicant, but Myron did not elaborate on the effect of these problems. A friend of applicant's mother testified that the father's drug habits affected the family because his mother had to act as both parents and she had "to pay the bill if we go out to eat like we used to." A legal assistant and student at UT-Arlington thought applicant was "a big loveable teddy bear" who had a lot to contribute to society because "he is willing

to help people." A 69-year-old former neighbor testified that applicant "has been a good neighbor" and played with his grandchildren. A woman who had dated applicant's older brother testified that when she had a young baby and no income, applicant invited them to stay at his house. He let her use his bedroom with its queen-sized waterbed while he slept on the living room sofa. Applicant told her that because of his father's drug habit, he had to be the man of the house, so he went out and got a job at age fifteen or sixteen. The mother of one of applicant's former girlfriend's testified that she never had a problem with applicant; he was a fun person, always kidding around. He brought her a corn plant and a couple of ivy plants; he bought her some mirrors. Another friend testified that applicant is a nice young man: "He's the type I wouldn't mind having for a son." He was never disrespectful or violent.

Applicant's mother testified that she thinks applicant still has worth and value as a human being. Applicant "is a good child. He was a slow learner, but he's worthwhile. There's no way [applicant] would have hurt Jennifer. He was too crazy about Jennifer. She was a good and decent child. I'm so sorry for [her] family." Applicant's mother knew that applicant "would never hurt nobody."

In rebuttal, the State called a different middle-school assistant principal who testified that he had received numerous disciplinary referrals about applicant. One of them read, "LaRoyce talks out in class daily. He laughs out loud, plays around, and disrupts class daily. I cannot tolerate him." Applicant told a different teacher, "I'm going to kick your ass." Another of applicant's high school teacher's testified that he had applicant in his pre-Algebra and physical-science class. "In one class, he called me a m--- f---- 7 times in one 55 minute period. On two occasions he tried to kill me. On one occasion he was going to put a bullet in my m--- f --- ing head." Applicant was taken out of this teacher's class after

about six weeks: "He would come in with no books, no preparation, never do any work, and sit sideways in the seat and just act like a little portent of evil. . . . He was always a big-time problem. It was a constant conflict."

At the punishment-charge conference, applicant requested an instruction on the objectives of the Penal Code as set out in Section 1.02; the trial court granted that request. Applicant also objected to the "anti-parties" instruction and asked for an instruction requiring the jury to find, "point-blank," that it was applicant who "directly" killed Jennifer by his own conduct. The trial court refused that instruction. The trial judge also gave the jury a non-statutory nullification instruction pursuant to the Supreme Court's then-recent decision in *Penry v. Lynaugh*.[7] Applicant did not object to the jury nullification instruction.[8]

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[7] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*).

[8] Applicant filed a pretrial "Motion to Declare Tex.Code Crim. Proc. Ann. Art. 37.071 Unconstitutional," claiming that the entire Texas statutory death-penalty scheme was invalid after *Penry I*, because "it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues." Therefore, according to applicant, the trial court was precluded from providing *any* instructions regarding mitigating evidence. "For the trial court to create a scheme that would permit the jury to respond to the Defendant's mitigating evidence would contradict the current status of the law."

The trial court denied this motion at a pretrial conference, but gave applicant's counsel a draft copy of the punishment charge and stated,

If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something better, just let me know and I'll look at it.

Applicant did not have any objection to the specific wording of the punishment charge; his objection went to the continued validity of the Texas statute after *Penry I*.

Based upon the evidence admitted at trial and the trial judge's instructions, the jury answered the two special issues "yes," and the trial judge sentenced applicant to death.

On direct appeal, applicant claimed that, under *Penry I*, Article 37.071 was unconstitutional because the jury was unable to give effect to his mitigating evidence in answering the special issues.[9] We rejected this claim and held that, even if applicant's mitigation evidence were beyond the scope of the two statutory special issues, the trial judge's supplemental instruction provided a sufficient vehicle for the jury to fully consider all of that evidence.[10] The Supreme Court declined to review applicant's claims on direct appeal.[11] We dismissed applicant's first petition for writ of habeas corpus because it was untimely filed, and he did not show any excuse or exception for its late filing.[12] The Supreme Court again denied certiorari.[13] We then allowed applicant to file a second petition for writ of habeas corpus which included, *inter alia,* a claim that the trial judge's supplemental "nullification" instructions were unconstitutional under the *Penry II* standard announced by the Supreme Court in 2001. We denied relief,[14] but the Supreme Court reversed our decision based upon its own opinion in *Tennard v. Dretke*,[15] which was delivered several months after our decision.

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[9] This claim was based upon his pretrial motion to declare article 37.071 unconstitutional as applied.

[10] *Smith v. State*, No. 71,333 slip op. at 10-11 (Tex.Crim.App. June 22, 1994) (not designated for publication).

[11] *Smith v. Texas*, 514 U.S. 1112, 115 S.Ct. 1967, 131 L.Ed.2d 857 (1995).

[12] *Ex parte Smith*, 977 S.W.2d 610 (Tex.Crim.App.1998).

[13] *Smith v. Texas*, 525 U.S. 1148, 119 S.Ct. 1047, 143 L.Ed.2d 53 (1999).

[14] *Ex parte Smith*, 132 S.W.3d 407 (Tex.Crim.App.2004).

[15] 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

In our former opinion, we noted that applicant relied on evidence of

> (1) his limited mental capacity, specifically that he was a "slow learner" in school, that he had an I.Q. of 78 and possible organic learning disabilities, and that he had dropped out of school in the ninth grade at the age of eighteen;
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> (2) his youthful age of nineteen at the time he committed this capital murder; and
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> (3) his father's time in prison, involvement with a motorcycle gang, drug and alcohol use, and stealing from his own family;

to support his claim that he produced *Penry* type evidence beyond the scope of the two statutory special issues.[16] We held that applicant had failed to show that any mitigating quality of his family background and mental-limitations evidence could not be fully encompassed by the two statutory special issues. Applicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder and both his learning disability and troubled background were relevant to whether he would constitute a future danger to society. In *Penry,* the evidence supported an inference that the defendant was unable to learn from his mistakes as a result of his low I.Q., brain impairments, and severe childhood abuse. Thus, he was more likely to be a future danger because of his permanent disabilities. Here, the evidence shows the reverse: despite applicant's limitations and difficulties, his behavior in school was often "exemplary." There is no evidence that applicant was unable to learn from experience or unable to control his conduct, with or without his disabilities.[17]

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[16] *Smith*, 132 S.W.3d at 413.

[17] *Id.* at 414-15. We footnoted *Graham v. Collins*, 506 U.S. 461, 475-76, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), in which the Supreme Court

The Supreme Court did not address our conclusion "that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence."[18]

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stated, "We do not read *Penry* as effecting a sea change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework." *Id.* at 474, 113 S.Ct. 892 (emphasis in original). The Supreme Court explained that in Gary Graham's case,

> the rule that Graham seeks is not commanded by the cases upon which *Penry* rested. In those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer. In *Lockett [v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)], *Eddings [v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], *Skipper [v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)], and *Hitchcock [v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)], the sentencer was precluded from even considering certain types of mitigating evidence. In *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had no reliable means of giving mitigating effect to that evidence. In this case, however, Graham's mitigating evidence was not placed beyond the jury's effective reach. Graham indisputably was permitted to place all of his evidence before the jury and both of Graham's two defense lawyers vigorously urged the jury to answer "no" to the special issues based on this evidence. Most important, the jury plainly could have done so consistent with its instructions. The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence—*unlike* Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer.

Id. at 475-76, 113 S.Ct. 892.

[18] *Smith*, 132 S.W.3d at 415-16.

II.

The usual method by which we assess purported jury instruction or charge errors is set out in *Almanza v. State.*[19] The *Almanza* standard applies both on direct appeal[20] and on the review of habeas corpus applications.[21] *Almanza* applies to federal constitutional errors contained within the jury charge.[22] Under that familiar standard, we must decide:

1. Was there error in the jury charge?

2. If so, "the next step is to make an evidentiary review . . . as well as a review of any other part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused." If the defendant failed to object to the jury charge, he must show that the error caused him such egregious harm that he did not have "a fair and impartial trial."[23]

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[19] 686 S.W.2d 157 (Tex. Crim.App. 19 84) (op. on reh'g).

[20] *See, e.g., Pickens v. State*, 165 S.W.3d 675,-680 (Tex.Crim.App. 2005) (unobjected-to jury charge error is analyzed for "egregious harm" under *Almanza*).

[21] *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex.Crim.App. 1985) (unobjected-to jury-charge error is analyzed under *Almanza's* "egregious harm" standard on habeas). *Cf. Ex parte Dutchover*, 779 S.W.2d 76, 77-78 (Tex.Crim.App.1989); *Ex parte Crispen*, 777 S.W.2d 103, 104-05 (Tex.Crim.App.1989), *id.* at 106-10 (Clinton, J., concurring) (arguing that court should limit cognizability of habeas claims to "exceptional" constitutional defects so "'fundamental' as not to be susceptible to a determination of harm").

Indeed, it would be quite illogical to employ a lesser standard of review for constitutional error on habeas review than on direct appeal. Were we to follow *Almanza* for jury-charge error on direct appeal, but adopt a lesser standard of review on habeas, the natural and logical result would be that all jury charge claims would be deferred until a person filed a petition for the writ of habeas corpus.

[22] *Jimenez v. State*, 32 S.W.3d 233, 238 (Tex.Crim.App.2000).

[23] *Almanza*, 686 S.W.2d at 174 (such a fundamental error must "go to

We will apply our usual *Almanza* analysis to applicant's claim that the jury charge did not ensure that the jury could give full effect to his mitigation evidence.

Therefore, we first re-examine whether applicant's mitigation evidence was fully encompassed within the two statutory special issues.[24] In our 2004 opinion, we held that the jury could fully address this evidence within the confines of the two special issues, but we used an analytical framework that was later repudiated by the Supreme Court in *Tennard*.[25] We are uncertain whether the Supreme Court also concluded that some of applicant's mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues.

Traditionally, this Court has looked to the factors set out in *Keeton v. State*[26] (decided two years before *Penry I*) to determine whether the State has proven, beyond a reasonable doubt, that the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society. Those factors include, but are not limited to:

> (1) the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or with other parties;
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> (2) the calculated nature of the defendant's acts;
>
> (3) the forethought and deliberateness exhibited by the crime's execution;

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the very basis of the case," or "vitally affect his defensive theory").

[24] On direct appeal, we did not explicitly address this question. *Smith*, No. 71,333 slip op. at 10-11.

[25] *See Tennard*, 542 U.S. at 284-88, 124 S.Ct. 2562 (rejecting Fifth Circuit's threshold standard for constitutionally relevant mitigating evidence); *Smith v. Texas*, 543 U.S. at 44, 125 S.Ct. 400 (rejecting this Court's reliance upon Fifth Circuit's standard).

[26] 724 S.W.2d 58 (Tex. Crim.App.1987).

(4) the existence of a prior criminal record, and the severity of the prior crimes;

(5) the defendant's age and personal circumstances at the time of the offense;

(6) whether the defendant was acting under duress or the domination of another at the time of the offense;

(7) psychiatric evidence; and

(8) character evidence.[27]

We relied upon these specific factors in rejecting applicant's claim, on direct appeal, that the evidence was insufficient to prove, beyond a reasonable doubt, that applicant would probably commit criminal acts of violence that would constitute a continuing threat to society.[28] Indeed, in his brief on direct appeal, applicant relied upon the very evidence that he now contends the jury could not adequately address under the two special issues to support his argument that the evidence was legally insufficient to show his future dangerousness. There he argued: "Appellant was nineteen years old at the time of the offense. He produced evidence that he was close to being mentally retarded and at the very least had a history of learning disabilities. His evidence showed a history of family strain caused by his father, who sold the family's personal property to buy cocaine."[29] According to applicant, this evidence, coupled with "[a]ppellant's extensive character evidence, which essentially went unrebutted by the State, established that appellant did not have a violent character and that the offense was an aberration."[30]

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[27] *Keeton*, 724 S.W.2d at 61.

[28] *Smith v. State*, No. 71,333 slip op. at 2-5 (Tex.Crim.App. June 22, 1994) (not designated for publication).

[29] Brief on Direct Appeal at 27.

[30] *Id.* at 29.

It would logically follow that, if applicant's mitigating evidence fit within the *Keeton* factors and was relevant in assessing the legal sufficiency of the evidence to support a jury's verdict of "future dangerousness," that evidence would be encompassed under the "future dangerousness" special issue. Evidence of applicant's youth would clearly be encompassed under the fifth *Keeton* factor, and Texas courts have agreed with the Supreme Court that the mitigating value of a defendant's youth can be considered under the "future dangerousness" special issue.[31] Similarly, evidence of applicant's generally "exemplary" behavior in his special-education classes could be considered under both the fourth and eighth *Keeton* factors as showing a relative lack of criminal behavior and generally good character. Evidence of his father's drug habit and theft from his family which may have "affected" applicant's character in some way[32] could be considered under the eighth factor.[33] Arguably, evidence of

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[31] *See Johnson v. Texas*, 509 U.S. 350, 368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (mitigating value of capital defendant's youthfulness was encompassed by Texas's second special issue; "It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue."); *Graham*, 506 U.S. at 475-76, 113 S.Ct. 892; *Barley v. State*, 906 S.W.2d 27, 39 (Tex.Crim.App.1995) ("Evidence of a defendant's age at the time of the offense is also a relevant consideration to whether a defendant constitutes a future danger to society. The United States Supreme Court has repeatedly approved of the consideration of a defendant's youth at the time of the offense because the impetuous qualities associated with youth are typically mollified by age and maturity.") (citations omitted).

[32] It is possible that applicant's conduct of stealing from his mother and his teachers might be connected to his knowledge of his father's thievery, but no witness ever made such a connection.

[33] *See Graham*, 506 U.S. at 476, 113 S.Ct. 892 (indicating that family background evidence falls within the scope of Texas's special issues; "Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retarda-

applicant's somewhat limited mental capacity (a school record notation of a full scale I.Q. of 78, and another cursory note on the same school form of "possible organic cause for learning problems") could not be fully considered under the *Keeton* factors, although Texas cases have held that evidence of limited mental ability may be considered under both statutory special issues.[34]

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tion and harsh physical abuse"); *Zimmerman v. State*, 881 S.W.2d 360, 362-63 (Tex.Crim.App.1994) (defendant's mitigating evidence that he came from a "'very disruptive, uneven family environment,' he experienced parental abandonment on two occasions, and that . . . he had suffered some abuse as a child" could be considered under two special issues). In our original habeas corpus opinion, we stated that applicant's father had been in prison for robbery, was involved with a motorcycle gang, consorted with other women, used alcohol and drugs, and stole from his own family. This situation upset applicant. Because the family did not have a lot of money, applicant began looking for work as a young teenager. According to defense witnesses, applicant suffered because of his father's thefts from the family and from a lack of money in the home. 132 S.W.3d at 413. However, no witness at trial described how the conduct of applicant's father did, or might have, "affected" applicant, except to say that he got a part-time job at the age of 15 or 16.

[34] *See, e.g., Zimmerman*, 881 S.W.2d at 362 (defendant's mitigating evidence, including testimony that his I.Q. was "in the 80's," could be considered under the statutory special issues); *Gunter v. State*, 858 S.W.2d 430, 445-46 (Tex.Crim.App.1993) (mitigation evidence that defendant was abandoned by mother, abused as a child, and subject to strict discipline by adopted parents who sent him to school unbathed and unfed as punishment could be considered under special issues), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex.Crim.App. 1994); *Goss v. State*, 826 S.W.2d 162, 166-67 (Tex.Crim.App.1992) (evidence of troubled childhood is adequately considered within second special issue); *Williams v. State*, 773 S.W.2d 525, 537-38 (Tex.Crim. App.1988) (evidence of defendant's low I.Q., though relevant to special issues, did not preclude jury from finding that he acted deliberately or from making an affirmative finding of future dangerousness); *Goodman v. State*, 701 S.W.2d 850, 866-67 (Tex.Crim.App.1985) (defendant's evidence of mild mental retardation did not make evidence insufficient to support jury's findings of deliberateness and future dangerousness),

We also note that numerous post-*Smith*, post-*Tennard* Fifth Circuit cases have held that mitigating evidence of this type is fully encompassed by the Texas "future dangerousness" or "deliberation" special issues.[35] Nonetheless, because we are

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overruled on other grounds by Hernandez v. State, 757 S.W.2d 744 (Tex. Crim.App.1988).

[35] In most of its post-*Tennard* decisions, the Fifth Circuit has concluded that the defendant's mitigating evidence could be fully addressed by the jury under the two Texas special issues. *See, e.g., Summers v. Dretke*, 431 F.3d 861, 882 (5th Cir.2005) (defendant's evidence of good character and good conduct could be given effect under Texas's statutory special issues); *Draughon v. Dretke*, 427 F.3d 286, 297-98 (5th Cir.2005) (defendant's evidence of abuse as a child and "dysfunctional upbringing" could be given effect under future dangerousness issue); *(Roy Gene) Smith v. Dretke*, 422 F.3d 269, 287 (5th Cir.2005) (defendant's evidence of addiction/ intoxication and childhood poverty were seemingly both covered by the special issues; arguably, evidence of his exposure to a crime-infested environment might not have been; COA on *Penry* claim granted); *Cole v. Dretke*, 418 F.3d 494, 500-11 (5th Cir.2005) (statutory special issues were broad enough to encompass defendant's evidence of his "destructive family background," fragmented personality, organic neurological deficiency, and youth); *Coble v. Dretke*, 417 F.3d 508, 522-27 (5th Cir.2005) (defendant's evidence of troubled childhood, mother's nervous breakdown, his orphanage, post-Vietnam mental instability, mental illness that could be controlled by medication, as well as evidence that he was well-respected and liked were all covered by statutory special issues; noting that "the supplemental instruction given in addition to the special issue interrogatories is *only* unconstitutional where the special issues themselves are not broad enough to provide a vehicle for the jury to give effect to the defendant's mitigation evidence"; any error in giving the supplemental instructions would be harmless and therefore not the basis for habeas relief); *Brewer v. Dretke*, 410 F.3d 773, 777-78 (5th Cir.2005) (special issues covered defendant's evidence that he had a bout with mental illness three months before murder, co-defendant manipulated him, he was abused by his father, saw his father abuse his mother, and he abused drugs).

In *Bigby v. Dretke*, 402 F.3d 551, 564-72 (5th Cir.2005), however, the Fifth Circuit found that the defendant's evidence that he suffered from untreatable chronic paranoid schizophrenia was *not* encompassed by the statutory special issues; thus, it granted habeas relief to Bigby.

uncertain as to the Supreme Court's current *Penry II* jurisprudence,[36] we will assume, for the sake of argument, that at least some of applicant's evidence was not fully encompassed by the two special issues. Thus, we shall assume that the jury charge in this case was constitutionally deficient under *Penry II.*

III.

A constitutionally deficient jury charge, however, does not result in automatic reversal of a conviction under *Almanza.* We must also assess the harm that this deficient jury charge caused the defendant. Whether sufficient harm resulted from the charging error to require reversal depends upon whether the defendant specifically objected to the error at trial. Under *Almanza,* when there has been a timely objection made at trial, we look only for "some harm." By contrast, where the error is urged for the first time on appeal or an application for habeas corpus relief, we look for "egregious harm."[37] We most recently applied our familiar *Almanza* standard of review to constitutional error in the jury charge in reversing the

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[36] The Fifth Circuit seems to share our uncertainty. *See, e.g., (Roy Gene) Smith v. Dretke*, 422 F.3d 269, 287 n. 8 (5th Cir.2005) ("We note that the Supreme Court has never explicitly stated that *Penry* claims cannot be extended beyond claims involving evidence of 'mental impairment.' In fact at times, it seems the Court has said the exact opposite. . . . The only mention the *Smith* Court made of whether the defendant's evidence was outside the reach of the special issue questions was the Court's single sentence that 'just as in *Penry II*, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented.'").

[37] *Almanza, supra*, 686 S.W.2d at 171; *Arline v. State*, 721 S.W.2d 348, 351 (Tex.Crim.App.1986).

third death-penalty sentence of Johnny Paul Penry.[38]

In analyzing jury-charge error under *Almanza* we review the entire trial record, from voir dire through closing ar-

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[38] *See Penry v. State*, 178 S.W.3d 782, 788 (Tex.Crim.App.2005) (stating that, after finding constitutional error in the jury charge, "[u]nder Code of Criminal Procedure Article 36.19, we will not reverse a conviction or sentence on the basis of jury charge error 'unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears that the defendant has not had a fair and impartial trial.'"; finding "some harm" under *Almanza* to objected-to jury charge error); *see also Ngo v. State*, 175 S.W.3d 738, 750-52 (Tex.Crim.App.2005) (finding "egregious harm" under *Almanza* to unobjected-to constitutional error injury charge). As this Court stated in *Jimenez v. State*, 32 S.W.3d 233 (Tex.Crim.App.2000):

> The question in this case is, what standard of harmless error applies to error in a court's charge that was not objected to, and that is claimed to violate a constitutional provision? We hold that the applicable standard is that provided by article 36.19 of the Code of Criminal Procedure: "the judgment shall not be reversed . . . unless it appears from the record that the defendant has not had a fair and impartial trial."
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> *Id.* at 233. "A party is not excused from the procedural requirements for objecting at trial merely because an error involves a constitutional right." *Id.* at 235. We explained that to invoke the protection of this federal rule [of casting a burden on the State to prove, beyond a reasonable doubt, that constitutional error was harmless under *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] in a state court, the appellant must have complied with the state court's procedural rule for preserving and presenting error. " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" If the right is forfeitable, as most rights are, an appellant who did not comply with the rules for preserving and presenting error must rely on the forum's rules for consideration of unpreserved error.

Id. at 238 (footnote and citations omitted).

guments at the punishment stage, to determine whether applicant suffered "egregious harm" from the deficient jury charge.

During voir dire, both the State and applicant questioned almost all potential jurors regarding their ability to consider mitigating evidence. Both sides explained the process of allowing jurors to change one of the special issue answer from a "yes" to a "no" if they found mitigating evidence sufficient to warrant a life sentence rather than the death penalty. Overwhelmingly, the jurors agreed that they could change a "yes" answer to "no" if instructed by the judge to do so upon finding sufficient mitigating evidence.[39] The Supreme Court specifically noted that the nullification instruction "intensified

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[39] The only exception was one juror (Mr. Zimmerman) who stated that he did not think that evidence of a defendant's drug abuse or childhood poverty would mitigate a death sentence. However, he indicated that he could consider other mitigating evidence such as mental capacity. The court then questioned him further:

> And after you have heard everything, if you thought well, [the answer to special question] one ought to be yes and [the answer to special question] two ought to be yes, but I think based on this man's something, something in his past, something about him, I don't think he ought to die, then you would be willing to go back and change one of the answers to no to make sure he didn't die; is that right?
>
> The juror said that he would be able to do so. Defense counsel argued that the juror could not consider mitigating evidence, and that his agreement with the questions posed by the court and the State were "simply paying lip service to the idea of actually really giving fair consideration to any mitigating circumstances in the case." When the trial court ruled that the juror was qualified, applicant used his final peremptory challenge on him. The court's ruling was within the bounds of reasonableness; furthermore, the juror was not em-paneled, and therefore applicant was not harmed by any potential prejudice caused by the juror's inability to consider a poor childhood or drug addiction as mitigating evidence.

the dilemma faced by ethical jurors"[40] in this case. That is indeed a possibility, although neither the jurors who served, nor the parties or trial judge noted such a potential dilemma or expressed such a concern, either during voir dire or later. *Almanza* requires a showing of "actual, not just theoretical, harm to the accused."[41] Given the record in this case, we cannot say that the discussion of the special issues and the nullification instruction during voir dire shows "actual" harm, much less "egregious" harm.

Turning to the evidence at the guilt stage, the State and the defense painted markedly different portraits of the Taco Bell robbery-murder and applicant's participation in that grisly deed. If the jury believed the State's evidence, applicant plotted to commit the robbery, and he was the leader of the pack. Applicant told a very different story. He had no idea that Kevin Shaw was planning to go to the Taco Bell that night, much less commit a robbery or a murder. Applicant was "a Good Samaritan" who snatched the bloody knife away from Kevin and took it out the door.

In sum, the State painted an evidentiary picture of Mr. Hyde; applicant presented a portrait of Dr. Jekyll. Both of these versions could not be true. The jury believed the State's version, but applicant's testimonial version of the events did not betray any lack of mental acuity. His testimony was clear, coherent, concise and consistent. He responded nimbly and held his own when the prosecutor cross-examined him.

The closing arguments at the punishment stage carried out the "Dr. Jekyll and Mr. Hyde" dichotomy. The State again emphasized the fact that the Taco Bell robbery-murder was applicant's idea. He knew Jennifer and he used his "charm" to get inside; then he hugged her. Her murder was pre-

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[40] *Smith v. Texas*, 543 U.S. at 48, 125 S.Ct. 400.

[41] 686 S.W.2d at 174.

meditated. He showed no remorse: after the murder, he matter-of-factly told his friends that "we had to shoot a girl," and his only concern was getting rid of his bloody jacket. The State referred to the prior aggravated assault of Chris Standmeir to show his continuing violence and to the prior possession of ten packets of cocaine to show his general lack of lawful conduct as well as his motive for the robbery.

The defense emphasized applicant's relative lack of prior criminality and his possible redemption and rehabilitation:

> The law answers those questions no, and only the evidence from that table can persuade you, if it can, to change those no answers to yes on those questions. That's the way the law works. Some of you said that you'd use it only as a last resort, only for habitual criminals who could not possibly be rehabilitated. . . . You said you would consider his track record, the kind of person he was deep down inside.
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> . . .
>
> Continuing acts of violence. Is he a continuing threat to society? On voir dire, almost all of you told us that you were looking for someone who had a long criminal record, that's in and out of the penitentiary, someone who cannot be rehabilitated. . . . This boy has not spent one day in the penitentiary.

The defense argued that "it's not too late for LaRoyce." It pointed to the fact that many witnesses had testified that he was "no problem" in school or at home. The defense mentioned applicant's family life: "I think it would take a fool to not think that the things that were going on in that family when their daddy was selling their appliances for crack is not going to have any impact at school." The defense focused on how much worse applicant's cohort, Kevin, was and how he had a much worse background than applicant. He emphasized that applicant did not kill Travis, the other eyewitness, and if

he were so terrible, he would have done so. The defense spoke of the mitigating evidence:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the court tells you that the State has a burden that if you think that he should not die, you are to put "no" in one of the spaces, that the State has the burden of proof beyond a reasonable doubt to convince each and every one of you that he should still die.

He spoke of applicant's I.Q.:

> The evidence we have, medical diagnosis, slow learner, may be organic. Objective test data, I.Q. 78. He is eight points from being mentally retarded. Why do you think LaRoyce gets along so well with kids? Because he's like one, that's why. Because he's like one. . . . It shows he is not a leader [like Kevin Shaw], it shows he's a follower.

He spoke of the family problems:

> Family problems. [The prosecutor] will say, "Well, we've all had problems and many of us have been raised by single parents." That's true, but how many of us have had our daddies sell our appliances for crack, that we've had to take and hide our V.C.R.'s, our T.V.'s, our freezers, so our own daddy wouldn't go and sell it for crack? You know that that has an impact on someone. It has an impact on how they act in school.

He noted the prodigious number of defense witnesses:

> The numbers do mean something, how many of us could say if we were in trouble that we could have that many people come and say something good? These people

know him. You have known him for eight days. They have known him for their life. They say he should not die. He is not evil. That's not the only thing you can do with him . . . . there is something good about LaRoyce. There is something worth saving. . . . They tell you he can be rehabilitated. Is he the worst of the worst? Is he someone who can't be rehabilitated? Has the State proven beyond a reasonable doubt that in spite of this overwhelming mitigating evidence, that he still needs to die, that there is nothing else we can do with him or to protect society, that you have to exterminate him like you would a stray dog or cat?

He spoke of remorse:

Reasonable deduction from the evidence, he has learned and has remorse. Why would he cry in front of the minister when he talked about the girl?

. . .

The State of Texas must prove to you beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence. You shall answer no to one of the issues to give effect to your meaning. LaRoyce's life is in your hands, no question about that. . . . These people didn't get up here because they didn't have anything to do and wanted to have a quick thrill in the courtroom. They testified and came down here because they wanted to tell you there is something worth saving. Both the State and defense presented vibrant and compelling arguments for and against the two special issues and the nature and quality of the mitigating (and aggravating) evidence. The primary theme of the defensive evidence and closing argument was that LaRoyce Smith was a young man whose life was worth saving. He had triumphed over such disabilities as being a slow learner with family troubles, and had proven himself a

> role model to other family members and friends. His pastor spoke on his behalf, as did his mother, brother, fiancee, and fiancee's mother. All were certain that he would not pose a risk of violence in the future: "What LaRoyce needs is a controlled environment."

In its final argument, the State reminded the jury that they knew applicant was no dummy. He noted:

> The I.Q. testing, and that's why we when we see the records and it shows his I.Q. is 78, we introduce the rest of the packet and we examine that and we find that his I.Q. is close to 90 on other testing within that file. That's for your consideration, but I ask you to judge him by his testimony, by his street-smartness and by his testimony that he gave. Nobody is going to fool LaRoyce Smith on the witness stand. I mean, he is not a bumbling fool. He is an intelligent individual and he so testified. No argument there, I would think.

The State began its closing argument with the following:

> Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, "Mr. [prosecutor], Ms. [prosecutor], if you prove to me that the answers to those special issues should be yes, then I can answer them yes." If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

Significantly, the prosecutor never suggested that the jury should ignore or fail to consider any of applicant's mitigation evidence in deciding whether the answer to those special issues should be "yes" or "no." Of course, the prosecutor

properly focused upon the evidence that would support a "yes" answer to both special issues, just as the defense had properly focused upon the evidence that would support a "no" answer to those special issues. The prosecutor concluded his remarks with the following:

> Ladies and gentlemen, I'm going to be sitting down in just a few minutes. The case is going to be in your hands. When we talked to you on jury selection, we talked to you—we told you at that time what we felt the facts were going to call for, that this was an individual where the ultimate punishment is earned by him over the years. The brutality of this particular case standing alone, if you absolutely knew nothing else about LaRoyce Smith and his background, the brutality alone calls for the death penalty in this case. So, please this is the time to have compassion, not for this individual, not for this outlaw, but for the victim and the victim's family. We'd ask you to consider that.
>
> Thank you, Your Honor.

The prosecutor never suggested that applicant's mitigation evidence should be ignored, that it did (or did not) fit into the two special issues, or that once the jury truthfully answered the special issues, it should ignore applicant's other mitigation evidence.

Although the jury ultimately answered the special issues in a way that required the trial judge to impose the death penalty, we are unable to conclude that the statutory special issues and nullification instruction caused applicant "egregious harm" in its effect upon the jury's deliberation of his mitigating evidence. Applicant fails to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low I.Q. test at the age of thirteen, his par-

ticipation in a special education reading program and speech therapy, or his troubled family background.[42] The basic defense theme was that he had triumphed over these youthful difficulties; he did not succumb to them. That is the strategy that his attorneys chose, and this is an approach that a jury might find persuasive.

Applicant's defensive evidence and theme created a very different picture of applicant than the evidence and theme that concerned the Supreme Court in *Penry*. In the latter case, the Supreme Court was troubled by Penry's "two-edged sword" evidence—the fact that he was mentally retarded was mitigating, but the fact that he was, therefore, unlikely to learn from his mistakes and incapable of rehabilitation or reformation, was aggravating.[43] Here, however, the defense was able to weave applicant's evidence of mental impairment, youth, and family background into a dramatic account of his humanity and triumph over adversity. It provided evidentiary support for defense counsel's well-crafted closing argument that "he has learned and has remorse" and thus he is "worth saving."

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[42] Applicant's position is that all *Penry* jury charge error is structural and thus immune from any harmless error analysis. This position conflicts with well-established Texas law under *Almanza*. It is inconsistent with our most recent decision in *Penry v. State*, 178 S.W.3d 782, 788 (Tex.Crim.App.2005). It would appear that, under Supreme Court precedent as well, *Penry* error is subject to review for harmless error. *See Brown v. Payton*, 544 U.S. 133, 125 S.Ct. 1432, 1452, 161 L.Ed.2d 334 (2005) (Souter, J., dissenting) (disagreeing with plurality which found no *Penry*-type error; concluding that the error was harmful under federal habeas standard set out in *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)); *see also Calderon v. Coleman*, 525 U.S. 141, 144-46, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998).

[43] *Penry I*, 492 U.S. at 323-24, 109 S.Ct. 2934 ("Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future" because "one effect of his retardation is his inability to learn from his mistakes").

It is possible that the two special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence and he may have suffered "some" actual harm. However, we do not find that the deficient charge was so egregiously injurious to his right to have the jury consider and evaluate all of his mitigation evidence that he did not receive a "fundamentally fair trial."[44] All of his mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that applicant has failed to show, by a preponderance of the evidence, that the unobjected-to jury nullification instruction caused him "egregious harm." We deny relief.

HERVEY, J., filed a concurring opinion in which KEASLER, J., joined.

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[44] *Almanza*, 686 S.W.2d at 172.

HOLCOMB, J., filed a dissenting opinion.

MEYERS, J., not participating.

HERVEY, J., filed a concurring opinion in which KEASLER, J., joined.

Applicant has raised only an unpreserved federal constitutional claim that the two statutory special issues and the nonstatutory "nullification" instruction at his 1991 capital murder trial did not provide the jury with a vehicle to give appropriate effect to applicant's mitigating evidence. This Court disposes of this unpreserved claim on an independent state ground under our state-law "egregious harm" standard for "unobjected-to jury-charge error."[1] *See Jimenez v. State*, 32 S.W.3d 233, 237-39 (Tex.Cr.App.2000). This essentially is the same review for unpreserved issues in the federal system. *See Jimenez*, 32 S.W.3d at 238; *see also United States v. Olano*, 507 U.S. 725, 730-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

The Court's opinion asserts that applicant could theoretically have suffered "some" actual harm from the "deficient" charge because the "two [statutory] special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence." *See Smith*, op. at 472.[2] The Court nonetheless decides that applicant suffered no "egregious harm" from the "deficient" charge because the jury could still have meaningfully (though not fully) considered any mitigating evidence within the context of the two statutory special issues under the circumstances of this case. *See Smith*, op. at 472 (applicant fails to provide any per-

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[1] *See Ex parte Smith*, S.W.3d slip op. at 2 (Tex.Cr.App. No. AP-74,228, delivered this date) (op. on remand from United States Supreme Court).

[2] This apparently is the reason the Court considers the charge to be deficient; i.e., the charge did not provide the jury with a vehicle to "fully" consider some mitigating evidence.

suasive argument that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low I.Q. test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background).[3]

I would decide, however, consistent with the United States Supreme Court's decision in *Johnson v. Texas*, that the Constitution requires only that a jury be provided with a vehicle to meaningfully consider mitigating evidence and not, as the Court's opinion seems to decide, a vehicle to "fully and completely" consider mitigating evidence. *See Johnson v. Texas*, 509 U.S. at 354, 368-72, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (Constitution requires only that a jury have some "meaningful basis" to give effect to mitigating evidence not that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant").[4] Since the two statutory special issues provided

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[3] The Court's opinion also states, *Smith*, slip op. at 472:

> It is possible that the two [statutory] special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence and he may have suffered "some" actual harm. However, we do not find that the deficient charge was so egregiously injurious to his right to have the jury consider and evaluate all of his mitigation evidence that he did not receive a "fundamentally fair trial." [Footnote omitted]. All of his mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that applicant has failed to show, by a preponderance of the evidence, that the unobjected-to jury nullification instruction caused him "egregious harm."

[4] Footnote 4 of the Court's opinion in this case cites to former Justice O'Connor's 5-4 decision in Part III-B of *Penry v. Johnson*, 532 U.S. 782, 797, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*), which quotes from her dissenting opinion in *Johnson*, for the proposition that a jury must have a vehicle to give *"full* consideration and *full* effect to mitigating"

applicant's jury with a vehicle to meaningfully consider applicant's mitigating evidence, there was no deficient charge (i.e., no error) and consequently applicant could have suffered no harm, particularly if the Supreme Court's decision in *Johnson* is still good law. *See also Ex parte Smith*, 132 S.W.3d 407, 427-28 (Tex.Cr.App.2004) (Hervey, J., concurring). Under these circumstances, the additional, non-statutory "nullification" instruction was completely gratuitous and could only have benefitted applicant by providing the jury with another vehicle to consider any mitigating evidence more fully than what *Johnson* and the Constitution require. *See id.*

So, even if the law requires that a jury be provided with a vehicle to "fully and completely" consider mitigating evidence,[45] the "nullification" instruction, particularly with the way that it was carefully explained to the jurors during voir dire, accomplished this. *See Smith*, 132 S.W.3d at 427- 28 (Hervey, J., concurring). Since we are disposing of this case on an independent state ground, we are not bound by the view expressed in *Penry II*, 532 U.S. at 801-02, 121 S.Ct. 1910 that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable

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evidence. *See Smith*, slip op. at 457 n. 4 (emphasis originally in *Penry II* and *Smith*). Such a rule, however, would "effec[t] a sea change" and require a significant alteration in the Supreme Court's capital sentencing jurisprudence as very thoroughly discussed in Justice Kennedy's majority opinion for the Court in *Johnson*, 509 U. S. at 365-73, 113 S.Ct. 2658. It would be very difficult to conclude that *Penry II* overruled all of this jurisprudence, particularly *Johnson*, without expressly saying so. It would be even more difficult to conclude that Justice Kennedy, in joining Part III-B of former Justice O'Connor's opinion in *Penry II*, repudiated *sub silentio* the position that he so very thoroughly set out in *Johnson*.

[45] *But see Johnson*, 509 U.S. at 372, 113 S.Ct. 2658 (Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant").

"nullification" instruction such as the one in this case. *See Smith*, 132 S.W.3d at 427 (Hervey, J., concurring).

I concur in the Court's judgment to deny habeas corpus relief.

HOLCOMB, J., filed a dissenting opinion.

I respectfully dissent. The majority misapprehends the plain directive of the United States Supreme Court in its reversal of this court: precisely, apply a harm analysis to Eighth Amendment error because "the nullification instruction was constitutionally inadequate under *Penry II*", effectively preventing the jury from giving full effect to Smith's relevant mitigating evidence.[1] *Smith v. Texas*, 543 U.S. 37, 48-49, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (*per curiam*). With the following comments, I dissent from the denial of habeas corpus relief.

Procedural Default

Although I was once persuaded to believe otherwise, Smith's federal constitutional claim that he was denied an effective vehicle by which a jury could consider and give effect to his mitigating evidence was not procedurally defaulted. *See Ex parte Smith*, 132 S.W.3d 407, 428 (Tex.Crim. App.2004) (HOLCOMB, J., concurring and dissenting). The majority appears to hold that, although Smith presented three written pre-trial motions upon his Eighth Amendment objection, his objection lacked the requisite specificity under our state-law error preservation rules, and therefore, his claim was procedurally defaulted. *See* Maj. op. *supra* at 462 & n. 9. And despite the fact that *Penry II* had yet to be decided, the majority holds that Smith's failure to object under the precise reasoning of *Penry II* is now fatal to his constitutional claim. Maj. op. *supra* at 462. Specifically, the majority faults Smith for arguing only that the applicable statute was unconstitutional as applied under *Penry I*[2], and thus, his failure to

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[1] *Penry v. Johnson*, 532 U.S. 782, 798, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

[2] *Penry v. Lynaugh*, 492 U. S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*) (remanding for new punishment hearing without assessing harm).

further object to the verbal nullification instruction, when invited to do so by the trial court, waived his *Penry II* claim. *See* Maj. op. *supra* at 462 & n. 9.

It should go without saying that a defendant does not waive his right to assert a constitutional violation by failing to object at trial if, at the time of his trial, that right had not been recognized. *Ex Parte Taylor,* 484 S.W.2d 748, 752 (Tex.Crim.App.1972) (citing and explaining *United States v. Liguori,* 430 F.2d 842, 847 (2d Cir.1970)). Because *Penry II* had not been decided by the Supreme Court at the time of Smith's trial, it would have been a superhuman feat indeed to specifically object that the verbal nullification instruction itself was inadequate to remedy the *Penry I* problem in his case and why (that the nullification instruction creates a situation whereby jurors would face an intractable ethical dilemma).[3] Smith should not be faulted for failing to anticipate the action of the United States Supreme Court. *See Liguori,* 430 F.2d at 847. Thus, the majority's reasoning that Smith did not preserve error cannot be countenanced, and further, it is not supported by the record.

The record reflects that Smith brought the Eighth Amendment error to the attention of the trial court, that the trial court understood his objections, and his objections were made with the requisite specificity to preserve error under Texas Rule of Appellate Procedure. 33.1 and the cases construing it. For example, in two pre-trial motions, Smith argued that:

- the Texas death penalty "statutory scheme may become unconstitutional as applied if the defendant offers mitigating evidence about his background or character or

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[3] We recently held that the *Penry II* nullification problem was not recognized at the time of a similarly situated capital defendant's trial and remanded the cause to the convicting court for consideration of the claim. *See Ex parte Robertson,* AP-74,720 * 23 (Tex.Crim.App. March 16, 2005) (not designated for publication).

the circumstances of the crime that are not relevant to the special verdict questions or have relevance to the Defendant's moral culpability beyond the scope of the special verdicts" (citing *Penry I)* (Clerk's Record at 73-74);

- "Tex.Code Crim. Proc. is Ann. Art. 37.071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues. There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type." (Clerk's Record at 80).

The majority unfairly characterizes Smith's arguments as broad-based objections to the statutory scheme and the court's charge that no possible instruction could cure, and faults Smith for failing to offer suggestions to the trial court about how, in his view, the nullification instruction should be worded. To say the least, however, the state of the law concerning the special issues was in disarray at the time of trial, and the arguments Smith made pertaining to the special issues were clearly sufficient to apprise the trial court of his federal constitutional claim under *Penry I.* In declaring otherwise, the majority is merely splitting hairs to avoid applying the proper beyonda-reasonable-doubt standard[4] to his meritorious federal claim. *See Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App.1992) ("no technical considerations

[4] *Beathard v. State*, 767 S.W.2d 423,432 (Tex.Crim.App.1989).

or form of words" are required to preserve error for review, and straightforward communication in plain English will always suffice if it lets the trial judge know what the party wants and why he thinks himself entitled to it); Tex.R.App. P. 33.1. Whatever we require of lawyers in Texas with respect to the rules of error preservation, we should not hold that they must be clairvoyant. *See Liguori*, 430 F.2d at 847. Because *Penry II* had not been decided and there was no enactment by the Legislature in response to *Penry I*, this is exactly what the majority requires from this lawyer. The record reflects that counsel went above and beyond what was required of him to preserve error under Tex.R.App. P. 33.1 and Tex.Code Crim. Proc. Ann. art. 36.14.[5]

I also find compelling Smith's argument in reply to the State's new position that Smith did not preserve error. That is, if Smith had offered particular wording or a proposed charge on mitigation, and that instruction was later declared to be inadequate under the yet-to-be-decided *Penry II* case, Smith would have invited the error and no relief could have been subsequently granted to him because of his acquiescence to the error. *See* Applicant's Reply Brief on Remand at 3 n.*; (Reporter's Record Vol VI at 3-4). It is puzzling to me that the majority thinks the better course for trial counsel was, in this unique and difficult situation, to create an estoppel-type-invited-error problem himself by suggesting, at the invitation of the trial court, further changes to the nullification instruction. *See also* Tex.Code Crim. Proc. Ann. art. 36.14.[6]

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[5] Providing in part that "the defendant or his counsel shall have a reasonable time to examine the [proposed charge] and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts."

[6] The rule governing objecting to the charge provides that Smith was not required to do what the majority suggests he should have done. "[A]nd

Moreover, as this exchange reflects, the trial court understood Smith's motions as a request for a sufficient mechanism to allow the jury to consider and give effect to his mitigating evidence.

> The Court: The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and ... put them in my mind together. Is there anything not included in those two motions that you wish to supplement orally?
>
> Trial Counsel: No, Your Honor.
>
> Trial Court: Those will have to be denied.

Smith further explained the potential for error in his Motion to Reveal Mitigation Charge, "[s]ince . . . *Penry* the Texas Legislature has met in several sessions but has failed to address the problems and issues created by the decision . . . [and the] Court of Criminal Appeals has had numerous opportunities to address the problem raised in *Penry* and has failed to do so in any written opinion." (Clerk's Record 87-88). Thus, the record clearly reflects that Smith's arguments before the trial court, if not explicitly stating that the nullification instruction was an inadequate remedy to cure his *Penry I* complaint, they were precise enough to put the trial court on notice, particularly since there was no statute or case law to look to for guidance. *See Taylor v. State*, 939 S.W.2d 148, 154-55 (Tex.Crim.App.1996) (grounds of objection, while imprecise, were apparent from the context). The majority's reasoning to the contrary, utilizes an arbitrary and unfair "hair-splitting analysis" to bar consideration of Smith's claim on the merits. *See Lankston*, 827 S.W.2d at 909, 911

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in no event shall it be necessary for the defendant or his counsel to present special requested charges to preserve or maintain any error assigned to the charge," as herein provided. *See* Tex.Code Crim. Proc. Ann. art 36.14 (emphasis added).

(concluding that it was clear from context that both judge and prosecutor understood the defendant's objection).

Our state preservation of error laws may not be applied to avoid addressing substantive claims in violation of federal law. *See, e.g., Washington v. Texas*, 388 U.S. 14, 22-23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Nor do I believe that this court may attempt to avoid reversal by cloaking federal constitutional error or harm in purportedly "independent and adequate state law grounds." *See* Concurring op. *supra* at 472-73; *cf. Kunkle v. Texas*, 543 U.S. 1039, 125 S.Ct. 818, 160 L.Ed.2d 605 (2004) (Stevens, J., concurring) (noting that Supreme Court did not have jurisdiction to consider Kunkle's *Penry* claim because it was barred under an independent and adequate state ground, i.e., Tex.Code Crim. Proc. Ann., Art. 11.071, § 5). "Random or inconsistent application of state rules of procedural default will not be regarded as 'adequate and independent state law grounds' so as to bar decision in federal habeas review." *Ex parte Gardner*, 959 S.W.2d 189, 193 (Tex.Crim.App.1996) (Clinton, J., dissenting) (citing *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)). Thus, contrary to the concurring judge's reasoning, *see* Concurring op. *supra* at 472-73, we cannot avoid federal review by now holding that Smith did not preserve error because "the question of when and how defaults in compliance with state procedural rules can preclude [federal court's] consideration of a federal question is itself a federal question." *See Henry v. Mississippi*, 379 U.S. 443, 447, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

Furthermore, a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed. *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964). *Barr* is instructive on this point. In *Barr*, the Supreme Court declined the invitation to hold that Petitioners did not preserve error on their constitutional claims because the state supreme court "refused to pass on objec-

tions" as "the exceptions taken below were 'too general to be considered [.]'" *Id.* In reaching its decision that it was not barred from reviewing the state court's decision, the Court considered the state court's recent treatment of similar cases. *See id.* at 149-50, 84 S.Ct. 1734. Finding that the state court had addressed the merits in five cases, where either identical or similar objections were made below, the Supreme Court concluded it was not prohibited from reviewing the claims on the merits. *See id.*

Our application of error preservation rules, as of late, have been applied capriciously and arbitrarily by this court;[7] therefore, a self-proclaimed "adequate" procedural bar cannot insulate the majority's holding from federal review. *See Henry v. Mississippi*, 379 U.S. at 447, 85 S.Ct. 564; *Barr v. City of Columbia*, 378 U.S. at 149, 84 S.Ct. 1734. It appears to me that this court has been (and clearly is in this case) improperly applying procedural bars to avoid granting substantive relief to defendants who are perhaps guilty but are otherwise entitled to the relief sought. The rule of procedural default should not be used as an ad hoc mechanism to avoid reaching the merits of a particular case.

And perhaps more significantly, this Court has already addressed the merits of Smith's claim twice: once on direct appeal, *LaRoyce Lathair Smith v. Texas*, No. 71,333 *10-11

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[7] For example, this court has become more and more willing to apply procedural bars to substantive complaints that were clearly preserved in the trial court, particularly where the substantive claim had merit and the defendant, by all accounts, was an unappealing recipient of relief. *See, e.g., Keeter v. State*, 175 S.W.3d 756 (Tex.Crim.App.2005) (holding that *Keeter* did not preserve error on a *Brady v. Maryland* [373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] claim, even though objection, written motion, and testimony were elicited before trial court in indecency with a child case); *Reyna v. State*, 168 S.W.3d 173, 176-77 (Tex.Crim.App.2005) (applying a "less common notion of error preservation" to indecency with a child case).

(Tex.Crim.App.1994) (not designated for publication), and also in our initial resolution of this very case. *See Ex parte Smith*, 132 S.W.3d at 416 (declining to impose procedural bar and addressing merits of Smith's claim); *see also* Maj. op. *supra* at 462 & n. 10 ("We rejected [Smith's direct appeal] claim and held that . . . the trial judge's supplemental instruction provided a sufficient vehicle for the jury to fully consider all of that evidence"); *see* Applicant's Reply Brief at 2 n. * (noting that the State has taken mutually exclusive positions throughout the case regarding error preservation). Because our holding was reversed by a higher court, a court which addressed the merits and found our holding on the merits to be erroneous, we may not now remedy the problem by failing to address the merits, and instead, decide that the substantive complaint was not preserved. *See United States v. Wells*, 519 U.S. 482, 487-88, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (acknowledging law of the case doctrine); *Granviel v. State*, 723 S.W.2d 141, 147 (Tex.Crim.App.1986) (same).

Obiter Dicta to Support Harmless Error

I disagree with the majority that it is arguable the Supreme Court did not "disapprove of" this Court's alternative holding "that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence." *See* Maj. op. *supra* at 457, 463. I believe the Supreme Court spoke quite clearly, holding, *inter alia*, that "just as in *Penry II* . . . findings of deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence [Smith] presented." *See Smith v. Texas*, 543 U.S. at 48, 125 S.Ct. 400.[8] Thus, there can be no reasonable conclusion that we were ordered to address anew

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[8] Because the Supreme Court has told us that Smith's mitigating evidence had little or no relation to the other special issues, the cases cited by the majority to support the contrary have no relevance to this proceeding. *See* Maj. op. at 465-67 & n. 34-37.

whether there was error. *See Penry v. Johnson*, 532 U.S. at 798, 121 S.Ct. 1910 (*Penry II*) ("we made clear in *Penry I*, none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse"); *Penry v. Johnson*, 215 F.3d 504, 514 (Dennis, J., dissenting) (Penry's mitigating evidence was shackled and confined within the scope of the three special issues). While our initial conclusion may not have been expressly disavowed by the Supreme Court, it was implicitly rejected. Reversed means reversed. *Tennard v. Dretke*, 542 U. S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

The majority's reasoning on the question of error is *obiter dictum*, and therefore, has no precedential value. But it does serve the distinct purpose of allowing the majority to weave into its harm analysis the disavowed conclusion that the two special issues submitted sufficiently encompassed Smith's mitigating evidence. *See* Maj. op. *supra* at 472. However, our judicial power does not include the power to issue advisory opinions and ignore orders from the Supreme Court.[9] *Ex parte Ruiz*, 750 S.W.2d 217, 218 (Tex. Crim.App.1988).

The Proper Harm Analysis

Not only does the majority overstep its bounds by deciding a question it is not authorized to consider, *see id.*, it further commits error by applying a state-law non-constitutional harm analysis to federal constitutional error. Specifically, because the majority now suddenly thinks that Smith did not

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[9] Despite its recognition of the Supreme Court's conclusion that the nullification instruction here was more confusing to the jury than the state court assumed, the majority explains while it was "indeed a possibility" that the nullification instruction intensified the dilemma for ethical jurors, the record does not reflect that any juror, party, or the judge so expressed this notion on the record. Maj. op. *supra* at 468. This, however, does not mean that confusion did not occur in the jury room where it was most likely to happen.

preserve error in the trial court—despite the fact that the majority once rejected the procedural default argument and twice addressed his claim on the merits, the majority applies our burdensome state-law "egregious harm" analysis to Smith's Eight Amendment claim. *See* Maj. op. at 463-64; *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App.19 84).

The majority's decision to apply our framework for unpreserved error in the jury charge is wrong for at least two reasons. First, simply because the manifestation of Smith's Eighth Amendment violation stemmed from the failure to include an instruction in a written jury charge, that Eighth Amendment claim does not therefore become a lesser state-law claim that we may dispose of under the less stringent standard of review for mere jury charge error. *Beathard v. State*, 767 S.W.2d at 432 (citing *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and explaining that the application of a state harmless-error rule is a state question when it involves only errors of state procedure or state law); *see also Jimenez v. State*, 32 S.W.3d 233, 236-37 (Tex.Crim.App.2000). Nor could we say, similarly, because the constitutional error was created by an omission in the jury charge, the proper review would be that reserved for non-constitutional errors. *See* Tex.R.App. P. 44.2(b) ("any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see also Almanza*, 686 S.W.2d at 171-72 (unpreserved error in the jury charge is reviewed for egregious harm).

Second, because the error *was* preserved, we should apply the harmless error standard in Tex.R.App. P. 44.2(a). *See Beathard v. State*, 767 S.W.2d at 432 (noting that our appellate procedure rule provides the same standard as the rule enunciated in *Chapman v. California, i.e.*, before federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt). Rule 44.2(a) provides that "If the appellate

record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Because the error here was a violation of the federal constitution that did not amount to a structural defect, we must determine whether it was harmless beyond a reasonable doubt. *See Jimenez*, 32 S.W.3d at 237. The majority errs in failing to do this.

In finding no *egregious* harm under the state-law *Almanza* standard for errors in the written charge, the majority denies relief. Contrary to its analysis, it is of no moment to conclude that the two special issues embraced most of Smith's mitigating evidence. The Supreme Court held the nullification instruction was "constitutionally inadequate" to allow that evidence to be considered under the charge Smith received. This is particularly true since the Supreme Court indicated that most of the mitigating evidence was similar to Penry's mitigating evidence.

Smith v. Texas, 543 U.S. at 48, 125 S.Ct. 400 ("just as in *Penry II*," deliberateness and future dangerousness had little to do with the mitigating evidence Smith presented). In other words, it is not possible that the special issues adequately channeled Smith's mitigating evidence to the jury because the nullification instruction itself "intensified the dilemma faced by ethical jurors," and as a consequence, choked off at the source any ability to express a reasoned moral response to the evidence. Because there was no principled distinction between Smith's instruction and Penry's, all of Smith's mitigating evidence was "shackled and confined" within the scope of the special issues. *See id.* at 47-48, 125 S.Ct. 400.

Similarly, that Smith did not suffer egregious harm because of the well-presented argument and the jury's perception of the evidence (whether aggravating, double-edged sword, or mitigating), is beside the point because in the absence of a

vehicle—a proper mitigation question—the jury had no way to express its reasoned moral response to the *argument* in mitigation and the *evidence* in mitigation. In other words, even if the jury was persuaded by the "Dr. Jekyll" argument and the "Dr. Jekyll" evidence, *see* Maj. op. *supra* at 469, the jury could not give any consideration or effect to it because it had no way to do so.

Lastly, the majority improperly places the burden of proof on Smith to show harm. *See* Maj. op. *supra* at 472 (applicant fails to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence). As we said in *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex.Crim.App.2000), no party should have the burden to prove harm from an error, as there is no way to prove "actual harm." Burdens and requirements of proving "actual facts" are appropriate in the law of evidence, but they have little meaning for the "harmless-error decision."

Conclusion

I would hold that, under the proper harmless error standard, Tex.R.App. P. 44.2(a), we must order habeas corpus relief. Based on the quantity and quality of Smith's mitigating evidence, to which the jury had no means to consider and give effect, I cannot say that the Eighth Amendment error was harmless beyond a reasonable doubt.

I respectfully dissent.

Respondent's Brief in the Supreme Court in *Penry II*
Excerpts: Summary of Argument and Sec. I.B

UNITED STATES SUPREME COURT
RESPONDENT'S BRIEF

No. 00-6677

JOHNNY PAUL PENRY,
Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

February 15, 2001

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether Penry's mitigating evidence was within the jury's effective reach under the instructions submitted at the punishment phase of trial.

2. Whether a report from a defense-requested, court-ordered psychiatric evaluation regarding an unrelated prior offense could be used by the State to rebut psychiatric evidence introduced by Penry at both phases of the trial.

* * * *

SUMMARY OF THE ARGUMENT

This case is not before the Court in the same posture as Penry I. Although bound by the special issues mandated by state statute, the trial court provided the jury with a supplemental instruction that clearly directed them to consider mitigating evidence and to give Penry a life sentence if they found that the evidence sufficiently lessened his moral culpability, regardless of the statutory special issues. The instruction was explained to the prospective jurors, collectively and individually, during voir dire, and defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction. The jury was not instructed to disregard the law, the instructions, their oath, or the evidence. For these reasons, the lower court properly deferred to the state court's decision because the decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

Penry's Fifth Amendment rights were not violated by the admission of the Peebles report at the punishment phase of trial after Penry injected mental health issues at both phases of trial. The Peebles report was the result of a psychiatric

evaluation conducted more than two years before Penry murdered Pamela Carpenter at the request of Penry's own lawyer regarding an unrelated, non-capital charge. The report was admitted into evidence at the punishment phase of trial during cross-examination of Penry's expert witness on mental health issues after that witness testified that he had relied on the report in forming the opinions he had proffered to the jury on direct examination. The report was also proper rebuttal evidence to demonstrate that his IQ test results were not an accurate indicator of his mental abilities and that his violent behavior was attributable more to his anti-social personality than to his abusive background and alleged mental retardation. Finally, given that the sole "defense-damaging" portion of the report was cumulative to the opinions of a number of witnesses, including Penry's own expert witness, error, if any, was harmless.

B. There is no reasonable likelihood that Penry's jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence.

In order to be entitled to relief on this claim, Penry must demonstrate a "reasonable likelihood" that the jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); see also Pet. Br. at 12-13. The requirements of the Eighth Amendment are satisfied if the mitigating value of the evidence, as actually proffered at trial, is within the "effective reach" of the jury in responding to the punishment issues and instructions. *Johnson*, 509 U.S., at 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). "In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding

of the instructions in the light of all that has taken place at the trial.'" *Johnson*, 509 U.S., at 368 (quoting *Boyde*, 494 U.S., at 381).

1. The charge clearly instructed jurors to consider Penry's personal moral culpability and to impose a life sentence, if warranted.

Penry's death sentence was based upon the jury's affirmative responses to the following three statutory punishment phase issues:

> (1) Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

JA 3:676-77. To make certain it cured the deficiency recognized by this Court's holding in Penry I—that the special issues, standing alone, were insufficient to provide a vehicle for consideration of the mitigating effect of Penry's evidence of mental retardation and abusive background, *Penry I*, 492 U.S., at 328—the trial court gave the following supplemental instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on

> any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving mitigating effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

JA 3:674-75 (emphasis added).

Contrary to Penry's assertions, the instructions given in this case did not impermissibly limit the jury's ability to consider and give effect to his mitigating evidence. The trial judge specifically instructed the jury to consider Penry's personal moral culpability and then told the jury how to impose a life sentence, if warranted. The trial court told the jury to

simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence an appropriate response to Penry's personal culpability. Further, the instruction did not specifically require mitigating evidence to fall under the literal language of the special issues, although much of Penry's mitigating evidence was relevant to the deliberateness prong of the first question. In any event, the instructions informed the jury how to give effect to mitigating evidence and impose a life sentence regardless of its initial answers to the questions. While the "as reflected by a negative finding" phrase in the final sentence was less than artful, the instruction as a whole adequately informed the jury how to impose a life sentence, if warranted.

There is no reasonable likelihood that the jury felt that it could not do that which the instructions specifically required. For the jury to believe that it could not give effect to mitigating evidence in the manner dictated by the charge would have rendered meaningless both the extensive mitigation instruction itself and the mitigating evidence that required it. See *Boyde*, 494 U.S., at 383 (finding jurors unlikely to construe instructions so as to transform defendant's presentation of "favorable testimony into a virtual charade") (citation omitted). The Court's core concern in Penry I, that "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence," Penry I, 492 U.S., at 320, was satisfied in this case.

2. Any ambiguity in the charge itself was clarified by statements of the trial court judge, the prosecutors, and defense counsel.

Even if the language of the charge, standing alone, was ambiguous, when viewed "with a commonsense understanding of the instructions in the light of all that has taken place at the trial," *Johnson*, 509 U.S., at 368 (internal quotes and citation omitted), it is clear that Penry's jury could not

have felt precluded from giving mitigating effect to his evidence. Contrary to Penry's assertions that it was solely defense counsel who explained to the jurors how to apply the supplemental instruction, Pet. Br. at 20-21, the conduct of all the participants throughout the proceedings supports the conclusion that Penry's mitigating evidence was within the jury's effective reach.

During the initial group jury voir dire, the prosecutor specifically told the venire that jurors would be instructed to take mitigating evidence into consideration and:

> . . . if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death . . . then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

JA 1:9-10. The prosecutor followed up on this explanation during individual voir dire. For example, during the individual voir dire of William Franz, the first venire member ultimately selected to serve on the jury, the following exchanges occurred during the prosecutor's questioning:

> Q: . . . Now, this [supplemental] instruction . . . is almost like a fourth issue in that you will hear this other evidence that comes in about the defendant, and you will take that into consideration when you are answering these three [special issues], but you can also take that evidence independently, even if you felt like the answers to these three questions was yes, if you felt like there was something in the defendant's background that the death penalty would not be appropriate, pick them all out, or pick one of them out and answer no. Do you feel like you can do that?
>
> A: Yes.
>
> * * * *

Q: Now, if you are on this jury, and you look at the evidence like I have talked about on these three issues here, you look back at the facts of the crime and you believe that should be answered yes, and you look to the second one, you look at the facts and the defendant's background, you think that should be yes, and you look at, again, the facts of the case and you believe number three should be yes, but if then you look at the mitigating evidence and you felt like that because of this mitigating evidence that the death penalty wouldn't be appropriate, if you felt like that indeed somehow the defendant's blame to this offense was reduced, could you then answer one of these issues no and in effect give the defendant a life sentence?

A: Yes, I could.

Q: Because that is what you would be sworn to do, and if you felt that way, you would be sworn to do that, and I just want to make sure that you can.

A: Yes.

Q: The other side of the coin is if you answered these three issues yes, and if you looked at this instruction and you weighed that mitigating evidence, if you decided in your mind that this mitigating evidence did not lessen the blame or did not lessen it to the extent that the death penalty would be inappropriate, if you just didn't think the mitigating evidence was strong enough, could you still answer these three issues yes, and in fact give the defendant a death sentence?

A: Yes, sir, I do.

R18:854-55, 866-67. The voir dire questioning of the remaining venire members ultimately selected to decide this case, see Tr 3:774 (list of jurors chosen), reflects similar comments from the prosecutor and the trial court regarding the supplemental instruction. In each case, the supplemental instruction was exhibited and explained to the venire member, and any confusion arising from a venire member's initial ex-

posure to the instruction was addressed until resolved. R.18:966-67, 980-81, 990 (Lloyd Davis); R.20:1287-88, 1315, 1318, 1321-22 (Gary McClure); R.22:1764-65, 1787, 1790-92 (David Moreno); R.23:2004, 2025-26, 2036-37 (Forest Marler); R.23:2144-45, 2168, 2171 (Mary Yarbrough); R.26:2751-52, 2776-77 (Machere Gillaspie); R.27:2901-02, 2930-31, 2942- 43 (Thomas Roberts); R.28:3330-31, 3359-62 (Earl Fountain); R.32:4466-67, 4481-86, 4488 (Diane Wood); R.34:344-45, 359-60 (Douglas Massey); R.35:751-52, 768- 69, 774 (Mark McElligott); see also defense counsel questioning at R.18:1018; R.20:1397; R.23:2224; R.26:2800, 2841; R.27:2947, 2952-53, 2955, 3012-13; R.28:3386-87; R.32:4556-58, 4562; R.34:418.[3]

During closing arguments, at no time did the prosecutors argue that the jury could not or should not vote "no" on a special issue unless Penry's evidence was directly relevant, in a mitigating fashion, to one of the three special issues. To the contrary, when prosecutors discussed mitigating evidence during punishment phase summations, they focused on the fact that Penry's violence was not attributable to alleged mental retardation and childhood abuse and, therefore, his blameworthiness and culpability were not reduced.[4] See, e.g.,

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[3] The supplemental instruction ultimately given was identical to the sample supplemental instruction exhibited during voir dire with the exception that the voir dire exhibit concluded with "a negative finding should be given to that special issue under consideration" as opposed to "a negative finding should be given to one of the special issues." See JA3:723-24. At trial, Penry called the change a "slight improvement to the Charge." R.50:1812.

[4] Penry's claim of mental retardation was vigorously disputed by the State at trial. Penry's claim of childhood abuse was not as vigorously disputed. For example, during closing arguments, while the prosecutors did not dispute that Penry had been abused and had suffered a "bad childhood," they asked the jury to consider whether testimony regarding the extent of the alleged abuse was credible. JA 3:604-08, 610-11, 615, 661-64.

JA 3:611-17, 664-67.

Consistent with the remarks of the trial court and the prosecutor during voir dire, defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction in determining the appropriate punishment:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you['ve] got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.
>
> If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

JA 3:640.

This case does not present facts "materially indistinguishable" from Penry I, and the state court's decision that Penry's jury possessed an adequate vehicle for consideration of mitigating evidence was not objectively unreasonable. All the parties were operating on the same permissible understanding of the mitigation instruction, and the instruction specifically directed the jury to answer any special issue "no" if it believed mitigating evidence called for a life sentence. There simply is no reasonable probability that the jury misinterpreted the instruction to preclude consideration of constitutionally relevant mitigating evidence.

Order Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 05-11304

LAROYCE LATHAIR SMITH,

Petitioner,

v.

TEXAS.

Oct. 6, 2006

Case below, 185 S.W.3d 455.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas granted.